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No. 14620

**United States
Court of Appeals**
for the Ninth Circuit

SIDNEY HING LOWE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Hawaii**

FILED

MAR 10 1955

PAUL P. O'BRIEN,

CLERK

No. 14620

United States
Court of Appeals
for the Ninth Circuit

SIDNEY HING LOWE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For the Petitioner, Sidney Hing Lowe:

W. Y. CHAR, ESQ.,
311 Liberty Bank Bldg.,
Honolulu, T. H.

For the Government:

LOUIS B. BLISSARD, ESQ.,
United States Attorney;

CHARLES B. DWIGHT, III,
Assistant U. S. Attorney,
Federal Building,
Honolulu, T. H.

Form N-405

United States Department of Justice
Immigration and Naturalization Service
(11-20-53)

No. 15,432

Original—(To be retained by Clerk of Court)

United States of America
Petition for Naturalization
(Under General Provision of the Immigration
and Nationality Act)

To the Honorable the Judge, U. S. District Court of
District of Hawaii at Honolulu, T. H.

This petition for naturalization, hereby made and
filed, respectfully shows:

(1) My full, true, and correct name is: Sidney
Hing Lowe.

(2) My present place of residence is: 2464 Nuuanu
Ave., Honolulu, T. H.

(3) My occupation is: Merchant.

(4) I am 60 years old.

(5) I was born on November 25, 1893, in Canton,
China.

(6) My personal description is as follows: Sex,
male; complexion, dark; color of eyes, brown; color
of hair, black; height, 6 feet 0 inches; weight, 124
pounds; visible distinctive marks, none; country of
which I am a citizen subject, or national, China.

(7) I am married; the name of my wife is: Ivy

Leong Lowe, we were married on April 12, 1920, at Sydney, Australia, she was born at Cho Bin, Chungshan, China, on April 1, 1900, and entered the United States at Honolulu, T. H., on August 27, 1928, for permanent residence in the United States and now resides at Honolulu, T. H. (with me) and was naturalized on (Month) (Day) (Year) at (City or town) (State); certificate No.; or became a citizen by.

(8) I have 4 children; and the name, sex, date and place of birth, and present place of residence of each of said children who is living, are as follows:

Henry Hing (m), Sydney, Australia, 1/23/21, Honolulu, T. H.; Rita Lowe (f), Sydney, Australia, 3/20/22, Honolulu, T. H.; Ellen Lowe (f), Sydney, Australia, 3/1/25, Honolulu, T. H.; Edward Hing (m), Honolulu, T. H., 8/23/29, Honolulu, T. H.

(9) My lawful admission for temporary residence in the United States was at Honolulu, T. H., under the name of Sidney Hing Low on January 29, 1926, on the SS Niagara and in 1928 I changed my status from visitor to treaty merchant administratively, as a permanent resident, pursuant to Article II of the Treaty of 1880 with China and the "rules of October 1, 1926, Governing the Admission of Chinese" enacted by the U. S. Immigration and Naturalization Service.

(11) It is my intention in good faith to become a citizen of the United States and to renounce absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of

whom or which at this time I am a subject or citizen.

(12) It is my intention to reside permanently in the United States.

(13) I am not and have not been for a period of at least 10 years immediately preceding the date of this petition a member of or affiliated with any organization proscribed by the Immigration and Nationality Act or any section, subsidiary, branch affiliate or subdivision thereof nor have I during such period engaged in or performed any of the acts or activities prohibited by that Act.

(14) I am able to read, write and speak the English language (unless exempted therefrom).

(15) I am, and have been during all the periods required by law, a person of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the United States. I am willing, if required by law, to bear arms on behalf of the United States, or to perform noncombatant service in the Armed Forces of the United States, or to perform work of national importance under civilian direction (unless exempted therefrom).

(16) I have resided continuously in the United States of America for the term of 5 years at least immediately preceding the date of this petition, to wit, since January 29, 1926, and continuously in the State in which this petition is made for the term of 6 months at least immediately preceding the date of this petition, to wit, since January 29, 1926; and

during the past 5 years I have been physically present in the United States for at least one-half of that period.

(17) I have not heretofore made petition for naturalization.

(18) Attached hereto and made a part of this, my petition for naturalization, are the affidavits of at least two verifying witnesses required by law.

(19) Wherefore I, your petitioner for naturalization, pray that I may be admitted a citizen of the United States of America, and that my name be changed to (none desired). I, aforesaid petitioner, do swear (affirm) that I know the contents of this petition for naturalization subscribed by me, and that the same are true to the best of my knowledge and belief, and that this petition is signed by me with my full, true name: So Help Me God.

/s/ SIDNEY HING LOWE,

(Full, true, and correct signature of petitioner, without abbreviation.)

Alien Registration No. 1,688,874.

Affidavit of Witnesses

The following witnesses, each being severally, duly, and respectively sworn, depose and say:

(1) My name is: Hilda T. Grilho, my occupation is housewife, I reside at 942 Kalihi St., Honolulu, T. H., and

(2) Ny name is: Norman F. C. Tang, my occu-

pation is merchant, I reside at 1013 Second Ave., Honolulu, T. H.

I am a citizen of the United States of America; I have personally known and have been acquainted in the United States with the petitioner named in the petition for naturalization of which this affidavit is a part, since at least July 1, 1949; to my personal knowledge the petitioner has resided, immediately preceding the date of filing this petition, in the United States continuously since the date last mentioned; that the petitioner has been physically present in the United States for at least 57 months of that period; and that he has resided at Honolulu in the Territory of Hawaii continuously since at least July 1, 1949. I have personal knowledge that the petitioner is and during all such periods has been a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, and in my opinion the petitioner is in every way qualified to be admitted a citizen of the United States.

I do swear (affirm) that the statements of fact I have made in the affidavit to this petition for naturalization subscribed by me are true to the best of my knowledge and belief: So Help Me God.

/s/ HILDA T. GRILHO,
(Signature of Witness.)

/s/ NORMAN F. C. TANG,
(Signature of Witness.)

(When Oath Administered By Clerk
or Deputy Clerk of Court)

Subscribed and sworn to before me by above-named petitioner and witnesses in the respective forms of oath shown in said petition and affidavit in the office of clerk of said court at Honolulu, T. H., this 1st day of July, A. D. 1954.

/s/ E. LANGWITH,
Deputy Clerk.

Form N-484-A

United States Department of Justice
Immigration and Naturalization Service
(Rev. 12-24-52)

Order No. 1130

Original

In the United States District Court,
District of Hawaii, Honolulu, T. H.

ORDER OF COURT

United States of America,
Territory of Hawaii—ss.

Upon consideration of the petitions for naturalization recommended to be denied, listed on List No. 1130, sheets 1 to 3, dated November 15, 1954, presented in open Court this 15th day of November, A. D., 1954, It Is Hereby Ordered that each of the

said petitions, except those petitions listed below, be, and hereby is, denied.

It Is Further Ordered that the recommendation of the designated examiner is disapproved as to the petitions listed below, and each of said petitioners so listed having appeared in person in open Court this.....day of....., 19..., and each having taken the oath of allegiance required by the naturalization laws and regulations, It Is Hereby Ordered that each of them be, and hereby is, admitted to become a citizen of the United States of America.

It Is Further Ordered that prayers for change of name listed below be and hereby are granted, except as to petition(s) No.....

Petition No.	Name of Petitioner	Change of Name
1		
2		

It Is Further Ordered that petitions listed below be continued for the reasons stated.

Petition No.	Name of Petitioner	Cause of Continuance
1		
2		

By the Court, this 15th day of November, 1954.

/s/ J. FRANK McLAUGHLIN,
Judge.

In the United States District Court
for the District of Hawaii

Petition No. 15,432

In the Matter of
SIDNEY HING LOWE, to be Admitted as a Citizen
of the United States.

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Sidney Hing Lowe, by W. Y. Char, attorney for plaintiff, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final order entered in this proceeding on November 15, 1954, granting the motion to dismiss the plaintiff's Petition for Naturalization.

Dated: Honolulu, T. H., this 6th day of December, 1954.

SIDNEY HING LOWE,
Plaintiff,

By /s/ W. Y. CHAR,
His Attorney.

[Endorsed]: Filed December 8, 1954.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men by These Presents:

That we, Sidney Hing Lowe, as Principal, and James K. I. Hong and J. T. Lum, as sureties, are held and firmly bound unto the United States Court of Appeals for the Ninth Circuit in the full sum of Two Hundred Fifty Dollars (\$250.00) for the payment of which well and truly to be made, we do bind ourselves, our executors and administrators, jointly and severally by these presents,

Whereas, the United States District Court for the District of Hawaii has entered an Order granting the motion to dismiss the plaintiff's Petition for Naturalization, and

Whereas, Notice of Appeal has been given to the United States Court of Appeals for the Ninth Circuit to secure a reversal of said Order,

Now, therefore, the condition of this obligation is such that if said appeal is dismissed or said Order is affirmed, and if said Plaintiff shall pay all costs as the said United States Court of Appeals for the Ninth Circuit may award, then this obligation shall be void, otherwise to remain in full force, effect and virtue.

In Witness Whereof, the above-bounden Principal

and Sureties have hereto affixed their hands this 29th day of November, 1954.

/s/ SIDNEY HING LOWE,
Principal.

/s/ JAMES K. I. HONG,

/s/ J. T. LUM.

Territory of Hawaii,
City and County of Honolulu—ss.

James K. I. Hong and J. T. Lum, being first duly sworn on oath, depose and say: That they are the James K. I. Hong and J. T. Lum named as Sureties and who filed the foregoing Bond and that they are worth the sum of Two Hundred Fifty Dollars (\$250.00) over and above all just debts and liabilities in property situate in the Territory of Hawaii and subject to execution.

Subscribed and sworn to before me this 29th day of November, 1954.

[Seal] /s/ JEANETTE Y. L. LEE,
Notary Public, 1st Judicial Circuit, Territory of
Hawaii.

My commission expires: September 25, 1957.

[Endorsed]: Filed December 8, 1954.

In the United States District Court
for the District of Hawaii

Petition No. 15,432

In the Matter of

SIDNEY HING LOWE, to be Admitted as a Citizen
of the United States.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

Appearances:

For Petitioner:

NICHOLAS W. Y. CHAR, ESQ.

For Government:

GEORGE Z. REICH, ESQ.,
Naturalization Examiner.

November 15, 1954

The Clerk: Petition 15,432, Sidney Hing Lowe.

Mr. Reich: If the Court please, there is a question of law. I believe Mr. Char will stipulate the facts.

The Court: That's correct, Mr. Char, that you will, depending on how he words it? You are in the mood to stipulate to it if he words it correctly?

Mr. Char: Yes.

Mr. Reich: This is the petition of Mr. Sidney Hing Lowe.

The Court: Sidney what?

Mr. Reich: Sidney Lowe, L-o-w-e, a native and

citizen of China, who arrived in the United States on January 29, 1926, at the port of Honolulu on the SS Niagara. And at that time he was admitted temporarily as a visitor. This petition, if the Court please, at Mr. Char's direction was prepared so that allegation number 9 thereof would show lawful admission for temporary residence in the United States, in Honolulu, T. H. It being a jurisdiction requirement that an applicant for naturalization be admitted for permanent residence, I move that the petition be dismissed on the ground that it does not set up a *prima facie* case.

The Court: Well, if he came in as a visitor in 1926 and he is still here——

Mr. Reich: I would like to call the Court's attention to a further allegation, "and in 1928 I changed my status from visitor to treaty merchant administratively." That is the allegation as was set in here by Mr. Char. Since it doesn't allege lawful admission for permanent residence I move for the dismissal of the petition.

The Court: Very well. That is the motion. Is there agreement as to the facts? Do you agree that the facts as stated by Mr. Reich are correct?

Mr. Char: Yes, changed administratively.

The Court: Yes or no?

Mr. Char: Well, in the short brief form, your Honor. I would like to make a further statement.

The Court: Well, what is wrong with the facts as he stated them? What is left out?

Mr. Char: That he changed his status in 1928 administratively.

The Court: Up to that point the facts are correct?

Mr. Char: Yes, under the terms of the Treaty, of the Chinese Treaty of 1880——

The Court: Chinese Treaty? .

Mr. Char: The Chinese Treaty with the United States or between China and the United States of 1880. And also in pursuance to——

Mr. Reich: If the Court please, that goes into argument on the law rather than as to the merits of this motion. The petition falls because it doesn't contain the necessary allegation.

The Court: Well, the reason why and under what provision of law he may have been allowed administratively to change his status in 1928 to that of a treaty merchant is interesting but it is not a fact. The fact is that in that year he was allowed to change his status——

Mr. Char: Yes, your Honor.

The Court: ——from visitor's to treaty merchant.

Mr. Char: Right.

The Court: That is all we need to know at the moment. How and why is another question. There is no dispute but what he did it.

Mr. Char: That's right.

The Court: So is there agreement now as to the facts?

Mr. Char: Yes, your Honor.

The Court: Alright. Now, the motion to dismiss your petition because you do not allege—you being the petitioner—that he was admitted for permanent

residence—and only persons admitted for permanent residence are eligible to become citizens if they meet other requirements——

Mr. Char: But the fact is that if he changed his status——

The Court: Wait a minute. That is the motion.

Mr. Char: Yes, sir.

The Court: I want to hear your argument.

(Arguments presented.)

Mr. Char: In his entry in 1926 he was admitted as a visitor. There is no question about that, which, as I say, the fact is true.

The Court: But where it calls for an allegation that he was admitted for permanent residence what do you say there?

Mr. Reich: The allegation “permanent” is stricken out and the word “temporary” is in.

Mr. Char: At the time he came in he was admitted for temporary purposes but when he changed his status then this——

The Court: Well, if you believe what you say, why didn't you amend your petition?

Mr. Char: I wish to amend it.

The Court: Well, you are conceding the motion as good, then?

Mr. Char: Yes, your Honor, for the time being, your Honor.

The Court: Now, you wish to amend?

Mr. Char: Right, your Honor.

The Court: Alright. Motion granted leave to amend granted. Ten days. Or do you wish to do it

right now? You will have to file a whole new petition. Will he not?

Mr. Reich: I think probably, or submitting a motion for amendment, written motion for amendment.

The Court: Alright. To have the record straightened out, you may do it orally on the record at this time if you so desire and are ready.

Mr. Char: I am ready to argue the case.

The Court: I know but the case you are arguing isn't the case that was made out by the pleadings. Let us keep the horse before the cart. Do you want to amend orally and have it reduced to writing later?

Mr. Char: If your Honor please, may I have the privilege——

The Court: Alright. You wish to amend what portion of the petition?

(Discussion off the record.)

The Court: You simply wish to delete the word "temporary" and insert the word "permanent," do you not, or leave the wording as to the allegation in print there stand?

Mr. Char: Yes, your Honor.

The Court: So that it shows affirmatively that your petitioner alleges that he was admitted for permanent residence. Are there any other allegations that are needed to support that conclusion?

(Further argument.)

The Court: Well, I think you had better take it up to the Ninth Circuit Court and tell them about it, because I am not convinced because at that time

there was a new law on the books, the Act of 1924. Therefore, I think your argument in the case upon which you rely, *United States vs. Kwai Tim Tom*, is distinguishable and I think the case cited by the examiner, *United States vs. Kwai Shun You* from the Ninth Circuit earlier in date is controlling, and therefore, your petition as amended is denied.

Reporter's Certificate

I, Albert Grain, Official Reporter, United States District Court for the District of Hawaii, do hereby certify that the foregoing is a true and correct transcript of my shorthand notes of the proceedings had in the matter of the petition of Sidney Hing Lowe, to be admitted as a citizen of the United States.

January 3, 1955.

/s/ ALBERT GRAIN.

[Endorsed]: Filed January 3, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Territory of Hawaii—ss.

I, Wm. F. Thompson, Jr., Clerk, U. S. District Court for the District of Hawaii, do hereby certify that the record on appeal in the above-entitled cause consists of a statement of the names and

addresses of attorneys of record and of copies of the pleadings and other papers as hereinbelow listed and indicated:

Petition for Naturalization.

Motion for Amendment of Petition and Order of Court.

Naturalization Petitions Recommended to be Denied.

Order of Court.

Reporter's Transcript of Proceedings.

Notice of Appeal to the United States Court of Appeals for the Ninth Circuit Under Rule 73(b).

Bond on Appeal.

Designation of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 11th day of January, A.D. 1955.

/s/ WM. F. THOMPSON, JR.,
Clerk.

[Endorsed]: No. 14620. United States Court of Appeals for the Ninth Circuit. Sidney Hing Lowe, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed January 12, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS TO BE RELIED
ON APPEAL

Plaintiff-Appellant above named, sets forth the following points on which he intends to rely on appeal:

1. The Court erred in granting the motion to dismiss the Petition for Naturalization of the Plaintiff upon the ground that his change of status from a visitor to a treaty merchant administratively in 1924, attributed to him permanent residence for for the purpose of naturalization.

2. The Court erred in granting the motion to dismiss the Petition for Naturalization of the Plaintiff in that the Court failed to hold that since he changed his visitor's status to a treaty merchant under the terms of the Treaty with China of 1880, without making a new entry to the United States in 1928, his treaty status, predicated solely on the terms of the Treaty, and not effected by the Act of 1924, attributed to him permanent residence for the purpose of naturalization.

By reason of said errors, the Order should be reversed.

Dated: Honolulu, T. H., this 21st day of December, 1954.

SIDNEY HING LOWE,

Plaintiff;

By /s/ W. Y. CHAR,

His Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed January 13, 1955.

No. 14,620

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SIDNEY HING LOWE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

W. Y. CHAR,

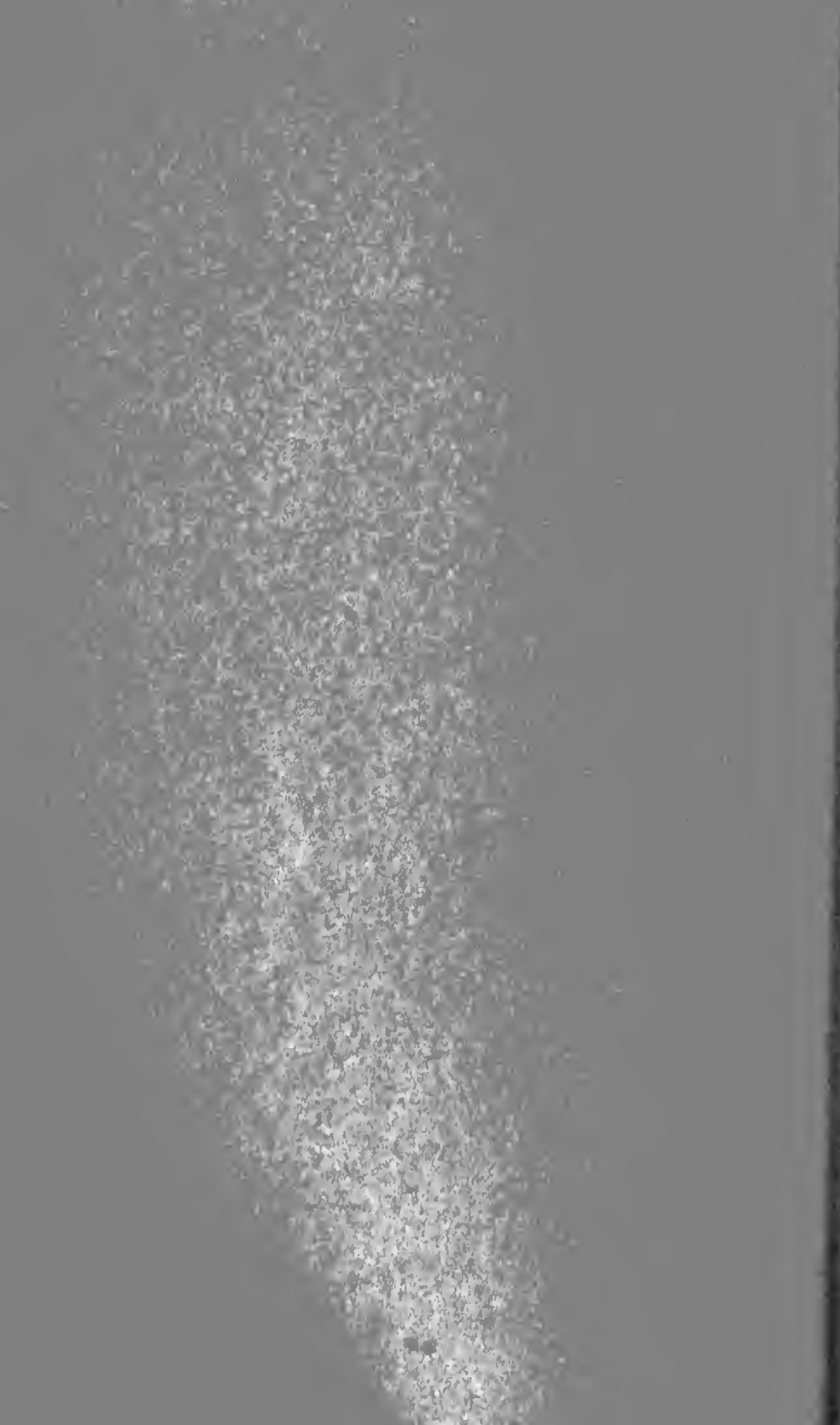
Room 311, Liberty Bank Building, Honolulu, T. H.,

Attorney for Appellant.

FILED

MAY 24 1955

PAUL P. GIBBEN, CLERK



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No. 14,620

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SIDNEY HING LOWE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

OPINION BELOW.

The District Court did not write an opinion. It rendered an oral ruling appearing in the record at pages 17, 18.

JURISDICTION.

This is an appeal from the order denying the petition for naturalization of the appellant on November 15, 1954 (R. 9, 18). Notice of appeal was filed on December 8, 1954 (R. 10). The jurisdiction of this Court rests upon 28 U.S.C., secs. 1291 and 1294.

STATEMENT OF FACTS.

Appellant is a citizen of China (R. 13, 14). He arrived in the United States on January 29, 1926, at the port of Honolulu on the SS. Niagara (R. 14). In 1928, he changed his status from a visitor to treaty merchant under Article II of the Treaty of 1880 with China, administratively (R. 14, 15). On July 1, 1954, he filed his petition for naturalization No. 15,432 (R. 3). His petition was denied on November 15, 1954 (R. 18).

QUESTION PRESENTED.

When, in 1928, the appellant changed his status from a visitor to treaty merchant under Article II of the Treaty of 1880 with China, administratively, without leaving the country and making a new entry, did he acquire permanent residence for naturalization in compliance with the provisions of 8 U.S.C. sec. 729 (c) ?

ARGUMENT.

The case of *United States v. Kwai Tim Tom*, 201 F.(2d) 595 (CCA 9th, 1953), is in point. Kwai Tim Tom's father first came to Hawaii prior to the Act of 1924 as a laborer. As a laborer he could not bring his son, Kwai Tim Tom, into the United States. So, in 1928, he changed his status from a laborer to treaty merchant, administratively, without leaving the country and making a new entry. This court said:

“The United States claims that if the father had become such a merchant prior to 1924, Kwai would have had the required permanent residence and have been admitted to citizenship. It claims that the Immigration Act of 1924 deprived Kwai’s father and Kwai of thus acquiring permanent residence by § 15 (8 U.S.C.A. 215) in effect amending Article II of the 1880 treaty by denying to the aliens thereafter entering the United States a permanent residence and making the residence limited in time.

However, it appears from the opening words of § 215, ‘The admission to the United States of an alien,’ that its provisions are confined to merchants thereafter seeking admission to the United States. Kwai’s father’s position was *sui generis*. He was one of the Chinese in Hawaii on its annexation by the treaty of 1898. He has never sought and is not now seeking admission as a merchant. He is here as a merchant and § 215 does not apply to him. Under the cases above cited he is here as a merchant under Article II of the Chinese treaty entitled to permanent residence and Kwai as his son is a permanent resident. He was properly admitted to citizenship as the husband of an American citizen.”

Analogously, the appellant, who is here and remains here, as a treaty merchant under Article II of the Chinese Treaty, is a permanent resident. He did not make an entry in 1928 when he changed his status to a treaty merchant. The word “entry” has a technical meaning. It is a word of art. *Barber v. Gonzales*, 98 U.S. 675. Appellant did not make an entry

in 1928 under 8 U.S.C.A. sec. 215. If he had, he would have come under the limitation of the Act of 1924. *U. S. v. Kwan Shun Yue*, 194 F.(2d) 225 (CCA 9th, 1952). The latter case shows that Kwan Shun Yue, an adult, arrived in the United States a few months after the Immigration Act of July 1, 1924 went into force and effect, as a treaty merchant and this court held that he came within the limitation of the Act of 1924, and thereby, instead of entering for permanent residence, he was relegated by virtue of the Act of 1924, as a resident limited in time, that is, a non-immigrant.

Chinese merchants, under the terms of the Treaty of 1880 with China, are in the United States for permanent residence. *Cheung Sum Shee v. Nagle*, 268 U.S. 336 (1925) and *United States v. Gue Lim*, 178 U.S. 459 (1900). The Immigration "Rules of October 1, 1926, Governing the Admission of Chinese" implemented such judicial interpretation and provided the procedure for the establishment of Chinese in the United States as treaty merchants under the terms of the treaty without leaving the country and entering again. Pursuant to such rules in 1928, appellant became a treaty merchant. The Immigration Act of 1924, sec. 15 (8 U.S.C.A. 215) modified the status of Chinese, who came in as treaty merchants after the Act of 1924, from that of permanent residence to temporary residence. Said sec. 215 regulates "The admission to the United States of an alien." However, appellant was not seeking admission into the United States, in 1928, when he changed his

status to a treaty merchant. He is here as a treaty merchant and sec. 215 does not apply to him. He is here under the Chinese Treaty. Consequently, he is a permanent resident for naturalization.

CONCLUSION.

It is respectfully submitted that the order of the District Court should be reversed.

Dated, Honolulu, T. H.,
March 2, 1955.

W. Y. CHAR,
Attorney for Appellant.



No. 14,620

IN THE
United States Court of Appeals
For the Ninth Circuit

SIDNEY HING LOWE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
District of Hawaii, Petition No. 15,432.

BRIEF FOR APPELLEE.

LOUIS B. BLISSARD,

United States Attorney,
District of Hawaii,

CHARLES B. DWIGHT III,

Assistant United States Attorney,
District of Hawaii,

LLOYD H. BURKE,

United States Attorney,
Northern District of California,

Attorneys for Appellee.

FILED

JUN - 3 1955

PAUL P. O'BRIEN, CLERK

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No. 14,620

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SIDNEY HING LOWE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court for the
District of Hawaii, Petition No. 15,432.**

BRIEF FOR APPELLEE.

PRELIMINARY STATEMENT.

It has been noted by Appellee that Brief for Appellant does not conform to Rule 18, Rules of the United States Court of Appeals for the Ninth Circuit. Rather than formally raising the question by a motion in this court, Appellee has included in his brief the statutes and treaties involved. Further, Appellant has failed to specify errors to be relied upon, consequently, Appellee has been guided by that portion of Appellant's brief headed "Questions Presented", and by Statements of Points to be Relied Upon on Appeal (R. 20). It is called to the atten-

tion of the court that Appellant has, in his Statement of Points, relied on alleged errors committed by the trial court in granting a Motion to Dismiss the Petition for Naturalization in this case. It is further noted that in point 1 it is stated that "his change of status from a visitor to a treaty merchant administratively in 1924, attributed to him permanent residence for the purpose of naturalization". The date 1924, as set forth in the printed record, is incorrect. Apparently the date should be 1928.

It is now drawn to the attention of the court that in this hearing a Motion to Dismiss was made (R. 14) and was granted with leave to amend (R. 16), and the Petition, as amended, was denied (R. 18, 8-9). It seems also apparent that Appellant is relying only on the granting of the Motion to Dismiss, with leave to amend.

I. STATEMENT OF PLEADING AND FACTS DISCLOSING JURISDICTION.

Appellee agrees with Appellant's statement of jurisdiction but adds the following:

1. The District Court had jurisdiction under 8 USC Section 1421;
2. The Petition for Naturalization, No. 15,432, was filed on July 1, 1954 under 8 USC Section 1427 in the United States District Court for the District of Hawaii (R. 3-8).

II. STATEMENT OF THE CASE.

Petitioner-Appellant filed a Petition for Naturalization on July 1, 1954 (R. 8). A Motion to Dismiss the Petition (R. 14) was made in open court and was granted with leave to amend (R. 16), and the Amended Petition was denied on November 15, 1954 (R. 18, 8-9). The question of lawful admission for permanent residence was raised by the Motion to Dismiss (R. 14) and by the grounds for opposition to the Petition (R. 14, 16, 17, 18).

III. STATUTES AND TREATIES INVOLVED.

Section 1421, Title 8, *United States Code*:

“(a) Exclusive jurisdiction to naturalize persons as citizens of the United States is conferred upon the following specified courts: . . . District Courts of the United States for the Territories of Hawaii and Alaska . . .

“(d) A person may be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter, and not otherwise.”

Section 1427, Title 8, *United States Code*:

“(a) No person, except as otherwise provided in this subchapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, *after being lawfully admitted for permanent residence*, within the United States for at least five years and during the five years immediately preceding the date of filing

his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, . . .” (Emphasis supplied).

Section 1429, Title 8, *United States Code*:

“Except as otherwise provided in this subchapter, *no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this chapter.* The burden of proof shall be upon such person to show that he entered the United States lawfully, and the time, place, and manner of such entry into the United States, . . .” (Emphasis supplied).

Treaty of 1880 between the United States and China:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights and privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation.” 22 Stat. 826, 827.

Section 3 of the *Immigration Act of 1924* states in part:

“When used in this Act the term ‘immigrant’ means any alien departing from any place outside the United States destined for the United States, except . . . (6) An alien entitled to enter

the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce in navigation . . .”

Section 13(c) of the *Immigration Act of 1924* states in part:

“(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a nonquota immigrant under the provisions of subdivisions (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, (3) is not an immigrant as defined in section 3, . . .”

Section 28(c) of the *Immigration Act of 1924* states:

“(c) The term ‘ineligible to citizenship,’ when used in reference to any individual, includes an individual who is debarred from becoming a citizen of the United States under section 2169 of the Revised Statutes, or under section 14 of the Act entitled ‘An Act to execute certain treaty stipulations relating to Chinese,’ approved May 6, 1882, or under section 1996, 1997, or 1998 of the Revised Statutes, as amended, or under section 2 of the Act entitled ‘An Act to authorize the President to increase temporarily the Military Establishment of the United States,’ approved May 18, 1917, as amended or under law amendatory of, supplementary to, or in substitution for, any such sections.”

IV. QUESTION PRESENTED.

Did the Petitioner-Appellant acquire by his original entry, or any subsequent action taken by him, lawful admission for permanent residence?

V. ARGUMENT.

SUMMARY OF ARGUMENT.

Appellant was admitted as a visitor on January 29, 1926, under Sections 3(2) and 13(c) of the Immigration Act of 1924, and was permitted to change his status to that of a treaty merchant in 1928, under Section II of the Treaty of 1880 with China, as amended and changed by Sections 3(6), 13(c), and 28(c) of the Immigration Act of 1924. Under either one of these statuses, he was not admitted as an "immigrant" (Sec. 3, Imm. Act of 1924), and consequently not admitted for permanent residence.

Entry prior to the 1924 Act.

The entry of a treaty merchant prior of the effective date of the Immigration Act of 1924 was held to be an entry for permanent residence. *Ex parte Goon Dip*, D.C.W.D.Wash. 1924, 1 F.(2d) 811; *Wong Sun Fay v. United States*, 9 Cir. 1926, 13 F.(2d) 67; *Haff v. Yung Poy*, 9 Cir. 1933, 68 F.(2d) 203; *In re Chi Yan Cham Louie*, D.C.W.D.Wash. 1946, 70 F.Supp. 493; *Petition of Wong Choon Hoi*, D.C.S.D.Cal. 1947, 71 F.Supp. 160.

The 1924 Act did modify and abrogate parts of the 1880 Treaty.

The 1924 Act provided that the word "immigrant" means any alien departing from any place outside the United States destined for the United States except
 ". . . (2) an alien visiting the United States temporarily, as a tourist or temporarily for business or pleasure . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce in navigation . . ."
 (Sec. 3, Imm. Act of 1924).

These two portions of Section 3 cover the case of Sidney Hing Lowe. He was admitted as a visitor and changed his status to that of a treaty merchant (R. 4, 14, 15, 16) under the Treaty of 1880, as superseded by the Immigration Act of 1924. Appellant changed from one temporary status to another.

It is here that Appellant and Appellee part company.

"The authorities are in agreement that treaty merchants entering subsequent to the Naturalization and Immigration Act of 1924 are limited in their privileges while here by the terms of that Act. They also show that the courts, in subsequent decisions, do not regard the Weedin case, *supra*, as holding that the treaties between China and the United States preclude Congressional action limiting the privileges of a treaty merchant who enters subsequent to such enactments. They also clearly show that Congressional enactments supersede treaty provisions inconsistent with them. See *Moser v. United States*, 1951, 341 U.S. 41, 71 S.Ct. 553, 95 L.Ed. 729; and

Clark v. Allen, 1947, 331 U.S. 503, 67 S. Ct. 1431, 91 L.Ed. 1633, 170 A.L.R. 953; Pigeon River Improvement, Slide & Boom Co. v. Charles W. Cox, Ltd., 1934, 291 U.S. 138, 54 S.Ct. 361, 78 L.Ed. 695; Head Money Cases (Edye v. Robertson), 1884, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798.”

United States v. Kwan Shun Yue, 9 Cir. 1952, 194 F.(2d) 225, 227.

Section 13(c) of the *Immigration Act of 1924* throws considerable light upon the subject. It states in part:

“No alien ineligible to citizenship shall be admitted to the United States unless such alien . . .
(3) is not an immigrant as defined in section 3.”

This section clearly limits right of residence, to maintaining status as a nonimmigrant, to treaty merchants and clearly puts at an end any right to permanent residence formerly acquired under the treaty. Treaty merchants, since the effective date of the 1924 Act, acquire only a temporary status as a nonimmigrant. *United States v. Kwai Shun Yue*, *supra*.

The theory of relation back before July 1, 1924, the effective date of the 1924 Act.

The prime example of such theory is admission, after the effective date of the Immigration Act of 1924, as permanent residents, of wives and children of treaty merchants who were *admitted prior to the effective date of the 1924 Act*. “Such holding seems to be based upon the American conception of unity

of the family." (and authorities cited) *United States v. Kwai Shun Yue*, *supra*, at page 227.

A further extension of this theory is found in *United States v. Kwai Tim Tom*, 201 F.(2d) 595, where a Chinese laborer's entry to the United States at annexation of Hawaii (1898), was the date to which his change of status was related. By the theory or relation behind the 1924 Act, again the full effect of the unamended 1880 Treaty was given to his treaty merchant status, and this court found he had acquired a status as a permanent resident and, hence, was eligible for naturalization.

The applicability of *United States v. Kwai Tim Tom* to this case.

It is the position of the Appellee, as partially set forth above, that the *Kwai Tim Tom* case is no more than one of a long line of precedent in which the entry of the person involved is related to some date prior to the effective date of the 1924 Act, July 1, 1924.

In some respects the facts of *Kwai Tim Tom* are very similar to this case. *Kwai* administratively changed his status to that of treaty merchant in 1928, just as did Appellant. No entry was made at the time of change of status. However, *Kwai* was able to relate his change of status back to the annexation of the Hawaiian Islands. *U. S. v. Kimi Yamamoto*, 9 Cir. 1917, 240 Fed. 390.

In the instant case, Appellant can only relate his entry back to 1926, to his first entry, admission, or coming to the United States as a visitor under the

Treaty of 1880 with China as superseded by the Immigration Act of 1924.

It is the view of Appellee that the *Kwai Tim Tom* case, *supra*, is not precedent for, nor does it support the contention of Appellant in this case.

Treaty merchant status is temporary.

A treaty merchant status acquired after the effective date of the 1924 Act, and which cannot be related back to an entry prior to the effective date, is a temporary status as distinguished from one of permanent residence (*U. S. v. Kwan Shun Yue, supra*; *U. S. v. Kwai Tim Tom, supra*; Sections 3, 13(c), 28, *Immigration Act of 1924*, 43 Stat. 153).

Lawful admission for permanent residence prerequisite to naturalization under Immigration and Nationality Act of 1952.

Appellant filed his petition for naturalization under Section 1427, Title 8, United States Code (R. 3). Appellant must have been admitted for permanent residence to be eligible for naturalization (8 USC Sections 1427 and 1429).

VI. CONCLUSION.

There is only one real issue involved here. That is, did the Appellant acquire a status as a permanent resident. We think he entered in 1926 as a visitor under the Immigration Act of 1924, as it modified the Treaty of 1880 with China, and changed his status in 1928 to a treaty merchant under the Immi-

gration Act of 1924, as it modified the Treaty of 1880. We think the treaty was modified by the Immigration Act of 1924 to make this treaty merchant status that of a nonimmigrant. He cannot relate his entry behind the effective date of the 1924 Act; he can only relate it back to his original entry in 1926, at a time which is subsequent to and controlled by the 1924 Act. Consequently, he has no status as an immigrant, and no lawful entry for permanent residence, as is required for his naturalization.

Dated, Honolulu, T. H.,
May 31, 1955.

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In the
United States
Court of Appeals
For the Ninth Circuit

ROBERT J. SHEEHAN, *Appellant,*

v.

LAWRENCE DELMORE, JR., Superintendent of Washington State Penitentiary at Walla Walla, Washington,
Appellee.

14662

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

FILED

MAR 11 1955

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In the
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ROBERT J. SHEEHAN, *Appellant,*

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LAWRENCE DELMORE, JR., Superintendent of Washington State Penitentiary at Walla Walla, Washington, *Appellee.* } 14662

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INGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

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In the
United States
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ROBERT J. SHEEHAN, *Appellant,*

v.

LAWRENCE DELMORE, JR., Superintendent of Washington State Penitentiary at Walla Walla, Washington, *Appellee.* } 14662

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASH-
INGTON, SOUTHERN DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE

BRIEF OF APPELLEE

JURISDICTION

The appellee will accept the jurisdiction of the Circuit Court of Appeals to hear this appeal.

STATEMENT OF THE CASE

Appellee will agree with the fact that the appellant was arrested on April 27, 1952, and that on April 29, 1952, the appellant was arraigned in Clark

County superior court under Cause No. 5163 following the filing of a criminal information charging appellant with the crime of robbery and that subsequent thereto appellant did plead guilty and on May 15, 1952, was sentenced to a term of not less than five years nor more than twenty years imprisonment in Washington State Penitentiary at Walla Walla, Washington.

Appellee further agrees that pursuant to a proper order of the Clark County superior court the appellant was returned to that jurisdiction and on the 10th day of December, 1952, a corrected judgment and sentence was entered on the motion of the state of Washington. Such corrected judgment and sentence is a part of the record.

It is true that appellant was adjudged guilty by the court after a plea of guilty by appellant without the assistance of counsel on April 29, 1952. However, this statement on face value would appear to mean that the appellant had been denied the right to counsel which, of course, is not in accordance with the facts. The court asked the appellant specifically whether or not he wished to consult with an attorney before he pleaded and appellant replied that he did not believe it would be necessary (Tr. 17). The court further advised him of his right to have a twenty-four hour delay in making his plea and to consult an attorney if he wished, and again appellant did not wish counsel. (Tr. 17.) Further, the court went into some discussion of the case with a Mrs. Hulet,

who had been charged together with appellant, concerning her rights to have an attorney, and subsequently thereto appointed counsel for her (Tr. 20, 21). Appellant was present during this colloquy. Now the appellant alleges a denial of the right to counsel in part because he was not asked specifically by the court the same as Mrs. Hulet. This, however, is untrue. He certainly was apprised of his right to counsel and the fact that the court would provide counsel at its expense if the appellant could not stand the expense.

This question was decided by the supreme court of the State of Washington and by the federal district court from which this appeal has been taken. The supreme court, after the matter had been presented to it by petitioner and appellee herein, found in Cause No. 32753 entitled "*Robert J. Sheehan, Petitioner v. John R. Cranor, Superintendent of Washington State Penitentiary*" in part that

"It further appearing that in imposing sentence the court fixed a minimum term as well as a maximum term of service, and later the petitioner was returned to the court and resentenced for a maximum term.

"The court finds from the matters and things presented to it that no right guaranteed the petitioner by either the constitution of the state of Washington or the constitution of the United States has been denied to him in connection with his arrest, arraignment, or entry of plea of guilty, or the judgment and sentence entered and imposed;" (Tr. 58.)

This order denying the writ was signed by the Honorable Thomas E. Grady, then Chief Justice.

Appellee submits that the question as propounded by appellant is not completely accurate and that the question involved is whether there is a denial of due process of law to one who has been adjudged guilty and sentenced, by subsequently not allowing him to withdraw his plea of guilty and be rearraigned without the benefit of counsel to argue the motion to change the plea.

ARGUMENT

The appellant in stating his question, says "Is it a denial of due process to refuse to allow one who is held under a void sentence to withdraw his plea of guilty before he is resentenced?" To this question appellee takes exception because it is the conclusion of the appellant, and the appellant alone, that he was held under a void sentence. Appellee submits that as a matter of fact the appellant was not held under a void sentence, but at most he was held under a sentence that was erroneous in that it did not prescribe the sentence which was fixed by the laws and statutes of the State of Washington. The statute relative to robbery in the State of Washington is found in RCW 9.75.010 and reads as follows:

"Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the per-

son or property of a member of his family, or of anyone in his company at the time of the robbery.

“Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery.

“Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

“Every person who commits robbery shall be punished by imprisonment in the state penitentiary for not less than five years.”

It will be noticed that this section of our criminal law, which was passed in the 1909 session of the legislature by chapter 249, section 166, prescribed a penalty of not less than five years' imprisonment in the state penitentiary. However, in 1935, our legislature, as amended by the legislature of 1947, passed the following section of our criminal law, that is RCW 9.95.010 which reads as follows:

“When a person is convicted of any felony, except treason, murder in the first degree, or carnal knowledge of a child under ten years, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

“The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was con-

victed, if the law provides for a maximum term. If the law does not provide a maximum term for the crime of which such person was convicted the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment, but in any case where the maximum term is fixed by the court it shall be fixed at not less than twenty years."

It will be noticed that by this section the court is directed to fix a sentence in such a case as robbery to a maximum sentence only of twenty years' imprisonment. This section was held to be constitutional and to be applicable in *State v. Seabrandts*, 191 Wash. 472. Thus, it is abundantly clear that the proper action of the court in the instant case would have been to sentence the appellant, as he was finally sentenced in December, to a twenty year sentence only, instead of the five to twenty year sentence as originally set. But, the question then arises whether or not this sentence is void. The appellee submits that it is not void and in *Siipola v. Cranor*, 38 Wn. (2d) 848, our supreme court found that

"We find merit in only one of petitioner's contentions, i.e., that the trial court should have sentenced him to a maximum of not more than fifteen years, rather than a maximum of not more than ten years. But this error does not, as petitioner contends, render the judgment void. Rem. Supp. 1947, § 10249-2, provides that the trial court shall impose the maximum sentence provided by law for the crime for which a defendant is convicted. The maximum penalty provided for grand larceny by Rem. Rev. Stat., § 2605 [P.P.C. § 117-55], is fifteen years' confinement in the state penitentiary. But, in *In re*

Bass v. Smith, 26 Wn. (2d) 872, 176 P. (2d) 355, where a sentence less than the maximum sentence was imposed, disregarding Rem. Supp. 1947, § 10249-2, we held:

“While the judgment was deficient, it was not absolutely unauthorized, or of an entirely different character from that authorized by law. The judgment was erroneous, in that it did not impose a sentence of not less than twenty years, as provided by Rem. Rev. Stat. (Sup.), § 10249-2, but it was not absolutely void.’

“That case is determinative of petitioner’s contention here; although the sentence was deficient, the judgment is not void.

“It is therefore the order of this court that the demurrer to the petitioner’s application for a writ of *habeas corpus* be sustained and the application dismissed. It is further ordered that petitioner, Nels Siipola, be returned to the superior court for Clallam county for the purpose of resentencing in accordance with Rem. Supp. 1947, § 10249-2.”

cf. Siipola v. Ness (1950) 90 F.S. 18. Our court has also stated that the trial courts cannot fix sentences at less than twenty years for conviction of a felony where no maximum term is fixed by statute. See *State v. Mulcare*, (1937) 189 Wash. 625, 66 P. (2d) 360. Further, our court has stated that under the law of this state it is mandatory that the trial court in sentencing, fix the maximum term only and the duty of the Board of Prison Terms and Paroles is to set the minimum term within six months following incarceration. *In re Pierce*, 1948 (31 Wn. (2d) 52).

Proceeding then, with the proposition that at no time was the appellant held under a void sentence, but only an erroneous one, the question is then whether

or not there was a denial of due process if, in fact, the court did deny the petitioner the right to the assistance of counsel at the time of resentencing procedure in December of 1952. Nowhere in the records compiled by the reporter who transcribed the proceedings is it apparent that the appellant at any time asked the court formally to either set aside the judgment and sentence and allow a new plea or specifically ask to be allowed counsel to represent him on the resentencing procedure. However, it must be admitted that on direct examination in the Federal District Court proceedings the deputy prosecuting attorney did state as follows (taken from trial transcript, pages 38 and 39) :

“A I recall, listening to Mr. Sheehan’s testimony, that he did make a statement in regard to his father’s ship and that he did request time for appointment of counsel.

“Q Do you recall whether he asked to have counsel appointed or was he going to have counsel brought down?

“A He was going to have counsel brought down. I didn’t mean appointed, I meant brought down.

“Q His father was when his ship came in?

“A I recall some discussion about a ship not being in and that sort of thing.

“Q Was this discussion off the record?

“A Pardon?

“Q Was the discussion off the record, or do you know about that?

“A No, as I recall, I believe the court was in session.”

This is buttressed by the so-called affidavits of the petitioner (Tr. pages 20 and 29). However, so far as the record shows, the only purpose for having Mr. Stewart appear was to have him recommend leniency on behalf of appellant although pursuant to Washington law one convicted of two felonies must serve a seven and one-half year minimum term on the second conviction without possibility of suspension or probation.

At the time of the proceedings on December 10, 1952, the petitioner had already been adjudged guilty. The judgment, so far as the guilt or innocence of the petitioner is concerned, was already a matter of fact and of record. The only thing left for the court to do was to enter the proper sentence pursuant to the judgment that had been rendered against the defendant. The judgment at no time was erased from the records, only the sentence. The question of whether or not one may withdraw a plea of guilty after having entered it is covered by RCW 10.40.170 which reads as follows:

“The plea of guilty can only be put in by the defendant himself in open court. At any time before judgment, the court may permit the plea of guilty to be withdrawn and other plea or pleas substituted.”

Our court has had many occasions to interpret this statute and in *In re Brandon v. Webb*, 23 Wn. (2d) 155, the court said:

“[2] A plea of guilty has the same effect in law as a verdict of guilty, except that, upon leave of the court, it may be withdrawn and

another plea substituted therefor at any time before the rendering of final judgment and sentence thereon. [citing cases]"

And, in *State v. Hensley*, 20 Wn. (2d) 95, at page 101, the court said:

"[3] We have uniformly held that, under that section, the application to withdraw the plea of guilty is addressed to the sound discretion of the trial court, to be exercised liberally in favor of life and liberty, but that when such discretion has been exercised the action of the court will not be disturbed, on appeal, except upon a showing of abuse of the court's discretion. [citing cases]"

"If appellant's original motion for permission to change his plea was in fact *denied* by the former judge, of which fact there is some evidence in the record, such action by the court was an exercise of its discretion, and there is no showing of any abuse of that discretion. As already stated, there was originally no affidavit supporting the motion, and the court was compelled to rely wholly upon the oral argument of counsel."

And in *State v. Jessing*, 144 Wash. Dec. 419, at page 421, the court said:

"[1] At any time before entry of judgment, the trial court may permit a plea of guilty to be withdrawn and other plea or pleas to be substituted. RCW 10.40.170. Appellant's motion to withdraw his plea of guilty having been made prior to the entry of judgment, it was timely made."

"[2] Motions of this kind are addressed to the sound discretion of the trial court, to be exercised liberally in favor of life and liberty. When such discretion has been exercised, the action of the trial court will not be disturbed

on appeal, except upon a showing of abuse of discretion. *State v. Rose*, 42 Wn. (2d) 409, 256 P. (2d) 493, and cases cited therein."

Also see *State v. Horner*, 21 Wn. (2d) 278, and *State v. McDowall*, 197 Wash. 323. In the latter case the prisoner contended vigorously that the trial court had abused its discretion in denying the motion to withdraw his plea of guilty. The court said on page 329:

"This section is permissive, and confers upon the superior court authority to permit the withdrawal of a plea of guilty. This section, then, vests the court with authority, in the exercise of its sound discretion, to permit a change of plea. The matter of the withdrawal of a plea once entered rests peculiarly within the discretion of the court. A ruling made in the exercise of such discretion will not be reversed, save for manifest abuse."

The petitioner has relied upon a case from the supreme court of the state of Washington which, it is felt by appellee, is being improperly used and cited. This is the case of *Thorne v. Callahan*, 39 Wn. (2d) 43. In that case, Thorne had been arrested and confined in the county jail at Everett. The arrest took place on June 3, 1950, and at 9:30 A. M. on June 6, 1950, the petitioner was brought before the court. On June 4, Thorne had been visited by a deputy prosecuting attorney who advised him that his wife had accused him of carnal knowledge of his nine year old daughter. Thorne apparently had no knowledge of any events which had occurred because of a drunken condition. The prosecutor then

advised Thorne that it was a serious crime and that he could be sentenced to as much as twenty years confinement so that it would be better for him to plead guilty in which case the prosecutor would recommend a light sentence and he would not have to serve more than one year. He further advised him that Thorne should answer "No" to the question of whether or not he wished the advice of counsel when asked by the court and that when the information was read he should plead guilty. Note that the prosecuting attorney undertook to advise Thorne of the accusation, the person making the accusation, the possible sentence which was stated as a maximum and the possible minimum he might be required to serve. Notice also that these statements were made although the prosecutor must have known that the wife could not testify, that carnal knowledge of a child under ten years of age was a mandatory life sentence and that there would not have been a minimum recommendation or a parole, at least not at that time. The court reversed the conviction and made many far reaching statements. However, the appellee urges that notwithstanding the statements made by the court, they were not speaking generally, but only about the case that was then before it. At page 60, the court said:

" * * * However, if they (here the court is speaking of the prosecuting officials) undertake to give them legal advice, it must be accurate and not misleading as to all matters encompassed therein. If they either intentionally or unintentionally fail to state such matters

correctly, they assume the risk of the possible invalidity of a sentence thereafter imposed where a prisoner who is without counsel may be sentenced to life imprisonment in the penitentiary. * * * ”

The appellant has alleged that his plea of guilty was obtained by certain acts of the prosecuting attorney, among them being false and misleading legal advice. The prosecuting attorney denies having falsely misled or advised the petitioner in his affidavit and the appellee would like to point out to the court in support of the truth of Mr. Blair's affidavit, that the petitioner spent from six to seven months in Washington State Penitentiary prior to the resentencing procedure. During this time he had the benefit of the "learned counsel" incarcerated at Walla Walla, and, although being advised that he had been denied certain constitutional rights, nevertheless at the resentencing procedure at a time when he knew of this denial he made absolutely no mention of the fact to the court in support of the position he now takes. The answer, it would seem, is obvious. Mr. Blair was present at that time.

CONCLUSION

It is respectfully submitted that the findings of the supreme court of the state of Washington and the United States federal district court are correct, and that at no time during the state trial court proceedings was the petitioner denied any constitutional right. The judgment of the district court should be affirmed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

FORREST L. MOE and EDITH B. MOE,
Appellants,
vs.

HUGH H. EARLE, Former Collector of Internal
Revenue at Portland, Oregon,
Appellee.

BRIEF OF APPELLANTS

*Appeal from the United States District Court for the
District of Oregon.*

FILED

APR 27 1955

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United States
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BRIEF OF APPELLANTS

*Appeal from the United States District Court for the
District of Oregon.*

JURISDICTION

This appeal, involving an action for refund of income taxes for the years 1949 and 1951 paid by the plaintiffs-appellants to the defendant-appellee as the then Collector of Internal Revenue, is taken from the final judgment of the District Court of the District of Oregon filed on October 12, 1954 (R. 72). The District Court had jurisdiction under 28 USCA 1340. Notice of appeal was filed by the plaintiffs on November 10, 1954 (R. 73). Accordingly, this Court has jurisdiction under 28 USCA 1291.

STATEMENT OF CASE

This case involves amounts contributed by the appellants (hereinafter referred to as "the taxpayers") to a capital fund of Apple Growers Association, a corporation operating as a nonprofit cooperative marketing association (hereinafter referred to as "the cooperative"), during the years 1930, 1931 and 1935 through 1937, as to which the cooperative in 1942 issued to the taxpayers "certificates of contribution to revolving capital fund". The cooperative in 1949 and 1951 refunded these amounts to the taxpayers in cash, which the taxpayers reported in their joint cash-basis income tax returns for 1949 and 1951. The taxpayers seek refund of taxes amounting to \$173.44 paid on these 1949 and 1951 cash receipts from the cooperative, plus interest, on the ground that such receipts did not constitute taxable income to the taxpayers in those years.

The issue is whether the monies contributed by the taxpayer to the cooperative's capital fund through charges by the cooperative against net proceeds of sales of the taxpayers' fruit, were taxable as income to the taxpayers (a) during the years 1930-1937 when contributed to the cooperative through such charges, or (b) in 1942 when the "certificates of contribution", evidencing such charges and the corresponding capital credits, were issued by the cooperative to the taxpayers, or (c) in 1949 and 1951 when the capital contributions were refunded to the taxpayers in cash.

The Apple Growers Association was organized in 1913 under the general corporation laws of Oregon, prior to enactment of the first Oregon cooperative association statute. It operated, however, at all times here concerned as a nonprofit agricultural cooperative association, with federal income tax-exempt status under Sec. 101 (12) of the Internal Revenue Code, and on what amounted to a non-stock membership basis (Ex. 15, pages 4-9, 21, 29-31; R. 28-29, 56).¹

The taxpayers, husband and wife, are fruit growers in the Hood River Valley of Oregon, and have been members and patrons of the Apple Growers Association and parties to its Standard Cooperative Growers Contract (Ex. 2), continuously since 1929 (R. 28, 55-56, 96). That contract (set forth in full in Appendix, *infra* p. 21) provides that the cooperative shall pool the fruit delivered to it by the taxpayers each year with fruit delivered by other growers under similar contracts, and shall pay the taxpayers their pro rata share of the net proceeds of the sale of such pooled fruit within thirty days after the cooperative's receipt of the money for that pool.

A by-law of the cooperative in effect when the taxpayers became members of the cooperative and thereafter until June 1, 1940, provided for a permanent "Building and Equipment Fund" charge based upon the amount of fruit handled by the cooperative, at a rate not

¹ The cooperative character of this corporation is analyzed in *Davidson v. Apple Growers Ass'n.*, 159 Or. 474, 79 P. (2d) 991 (1938).

exceeding five cents per package to be fixed by the Board of Directors, and to be used exclusively for "the purchase of or paying for property, equipment or betterments" (Appen. p. 21; R. 29-30, 56-57, 113). This fund was built up by the cooperative through an annual charge on the ledger account of each patron of the cooperative, based upon the amount of fruit handled for that patron, and at a rate per package fixed each year by the Board of Directors. Such Building and Equipment Fund charge was deducted from each patron's share of the net proceeds of the fruit pools, and was balanced by a corresponding credit to that patron's capital ledger account with the cooperative (Ex. 3, 4, 5, 6, 33; R. 30-32, 57-59, 128-131).

After the closing of each pool in which the taxpayers had fruit the cooperative supplied to the taxpayers, in accordance with its normal procedure as to all patrons, a written Pool Closing Statement (Ex. 31) showing the quantity of the taxpayers' fruit handled, prices and amount received therefor by the cooperative, the rates and amounts of the cooperative's expenses applicable to that fruit, the rate and amount of the per-box Building and Equipment Fund deduction, and the "net credit" to the taxpayers resulting from deduction of such expenses and Building and Equipment Fund charge from the gross sales proceeds. The amount of such net credit was then paid or available to the taxpayers in cash (R. 30-31, 98-99, 125-131).

The sums thus charged and credited to the taxpayers for the Building and Equipment Fund are as follows:

Year	Amount
1930.....	\$140.46
1931.....	\$261.48
1935.....	\$ 78.76
1936.....	\$116.99
1937.....	\$100.25

Until the year 1940 there was no provision in the cooperative's by-laws for, and the cooperative did not issue, any kind of certificate evidencing such Building and Equipment Fund contributions. In that year, by an amendment to the by-laws, the Building and Equipment Fund was made a part of a revolving capital fund and provision was made for the issuance of a "certificate" each year to each member of the cooperative showing the amount of that member's contribution during the year to the revolving capital fund (Ex. 14, pp. 11-15; R. 32-37, 60-65). Accordingly, in 1942 the cooperative issued and delivered to the taxpayers five documents each entitled "Certificate of Contribution to Revolving Capital Fund", stating the amount contributed by the taxpayers to the Building and Equipment Fund during each of the five years 1930, 1931, 1935, 1936 and 1937 concerned in this action (Ex. 8, 9, 10, 11 and 12; R. 37, 65). The by-law providing for the issuance of such certificates specified that:

"Said certificates shall not be evidence of any debt, shall not bear interest, shall give no voting rights, shall become null and void if the membership under which the 'contributions' were made shall be canceled, terminated or forfeited, and shall not be negotiable or assignable except to the purchaser of the membership under which the 'contributions' were made, together with a sale and conveyance of the premises to which the membership

pertains and then only by consent of the Board of Directors and subject to any unpaid debt or obligation of the assignor." (Ex. 14; R. 36, 64).

The form of certificates issued to the taxpayers included on its face the following:

"This is to Certify that during the fiscal year beginning June 1, _____, contributions totaling _____ were made to said fund by the above-named member or his predecessor. Upon surrender of this certificate the contributor or rightful assignee will be entitled to a refund of his pro rata share thereof with all other contributors for said year, subject to all provisions of members by-laws of the Association, when and if the Board of Directors shall determine to refund same.

"This certificate does not represent any debt owing by the Association, shall not bear interest, gives no voting rights, becomes null and void after the membership under which said contributions were made shall be by any owner thereof cancelled, terminated or forfeited, shall not be negotiable or assignable except to the purchaser of the membership under which contributions were made and the premises to which same pertains, and then only by consent of the Board of Directors of said Association and also, subject to any unpaid debt or obligation of the assignor to the Association to be assumed by such accepted assignee.

"The time and amount of any refund upon this certificate is and shall be within the discretion of the Board of Directors of Apple Growers Association and the rights hereunder are and will be governed by the members' by-laws of said Association and the holder hereof will and does accept same subject to those conditions and with that knowledge." (Ex. 8, 9, 10, 11, 12).

After issuance of the first certificates of contribution in 1942, the cooperative each year has issued such certificates during the same calendar year in which the contributions evidenced by the certificates have been made (R. 116).

The taxpayers did not file income tax returns for any of the five years prior to 1942 during which the Building and Equipment Fund contributions and credits here involved were made and entered (R. 41). They did file a timely joint return for the year 1942, on a cash-receipts basis, but did not include therein any sum represented by the certificates issued to them in that year (R. 39, 99-101).

In 1949 the cooperative, in "revolving" the Building and Equipment Fund portion of its revolving capital fund as provided by the by-law adopted in 1940, refunded to the taxpayers in cash the \$401.94 which had been contributed by them to the Building and Equipment Fund during the years 1930 and 1931, upon surrender of the certificates covering these contributions (R. 38, 66). The taxpayers also received from the cooperative during the year 1949 a certificate of contribution to revolving capital fund evidencing \$986.18 which the taxpayers had contributed to the revolving capital fund through deductions from net sales proceeds during the 1948-1949 fiscal year (R. 39, 67).

In their joint income tax return for the calendar year 1949 (Ex. 26), the taxpayers included the \$401.94 cash Building and Equipment Fund refund received by them during that year, but they did not include the

certificate of contribution issued to them in the year 1949 or any part of that year's capital contribution evidenced by that certificate (R. 38-39, 66-67, 106-107). The taxpayer Forrest Moe had been informed in the early 1940s by the then president of the cooperative that the Bureau of Internal Revenue had advised that the members of the cooperative should report only cash received in refund of the amounts represented by such certificates, and not the certificates themselves (R. 100-101).

The Bureau of Internal Revenue caused a field audit to be made of the taxpayers' 1949 return, and the amount of the 1949 revolving fund certificate was added in the full face amount thereof, \$986.18, and the consequent additional tax was assessed to and paid by the taxpayers (R. 39, 67). This was subsequent to a ruling by the office of the Commissioner of Internal Revenue dated April 13, 1950, that amounts includible for tax purposes in the gross income of cooperative association patrons were not restricted to cash distributions but also included the face amounts of revolving fund certificates (Ex. 27, 38).

In the year 1951 the taxpayers received from the cooperative cash refunds, totaling \$296.00, of their contributions to the Building and Equipment Fund during the years 1934, 1935 and 1936, and they surrendered the certificates covering the same (R. 40, 68-69). They also received in 1951 a certificate evidencing their payments to the revolving capital fund during 1951 (Ex. 28). Their joint 1951 tax return included the cash refund of the 1935, 1936 and 1937 Building and Equip-

ment Fund contributions, and also the face amount of the certificate issued in 1951 (Ex. 28; R. 107).

Timely claims for refund thereafter were filed by the taxpayers covering the taxes paid by them for the years 1949 and 1951 on the cash refunds during those years of their previous contributions to the Building and Equipment Fund, on the ground that such refunds were not income to the taxpayers in those years (Ex. 29, 30).

The taxpayers contended in the District Court that under the facts peculiar to this case, their contributions to the Building and Equipment Fund of the cooperative constituted income received by them only in the years in which originally contributed, that is, in the years in which the cooperative's charges against them for its Building and Equipment Fund were deducted from the net proceeds of the cooperative's sales of their fruit and credited to their capital account; that the later issue, in 1942, of "certificates of contribution" was of no significance for tax purposes; and that the refunds to them in 1949 and 1951 of their contributions to the Building and Equipment Fund during the period 1930-1936 constituted a return to them of capital, and not taxable income.

The case was tried to the Court (Honorable Gus J. Solomon), sitting without a jury. The Court rendered an oral opinion (R. 52), but no written opinion was filed. The Court's findings of fact and conclusions of law appear on pages 54-71 of the Record.

The District Court agreed with the taxpayers that the 1942 issuance to them of the certificates of contri-

bution did not constitute or represent taxable income to the taxpayers in 1942. The Court further concluded, however, that taxable income was received by the taxpayers in the years 1949 and 1951 when they received the cash refunds, and that no taxable income was received in the earlier years when the money originally was deducted from the taxpayers' sales proceeds, for the capital fund (R. 53, 70-71).

SPECIFICATION OF ERRORS

The District Court erred:

1. In concluding that the amounts paid to the taxpayers in cash by the cooperative in 1949 and 1951 to redeem the certificates of contribution to revolving capital fund issued in 1942 to evidence Building and Equipment Fund contributions in prior years, were income to the taxpayers in 1949 and 1951, and were not income in the years in which such amounts were deducted by the cooperative from the net proceeds of the sale of the taxpayers' fruit (R. 70-71). (This specification includes Points I, II and III, R. 76-77.)

2. In entering judgment against the taxpayers dismissing their complaint (R. 70-73).

ARGUMENT

Summary of Argument

The taxpayers received full payment of the net sales proceeds of their fruit each year when a part of such proceeds was paid to them in cash and the balance was

set off by the cooperative against their obligation to contribute to the cooperative's capital fund. Accordingly any tax on that part of the net proceeds which the taxpayers invested in that manner in the capital of the cooperative accrued in the years, and only in the years, in which those capital investments were made. The "certificates" issued in 1942 were mere receipts evidencing such prior capital investments by the taxpayers, and could not constitute or represent 1942 taxable income in any amount. The cash received by the taxpayers in 1949 and 1951 in refund of the prior investments in the cooperative's capital was a return of capital and hence not taxable as income during those years.

I.

THE FULL NET PROCEEDS RECEIVED BY THE COOPERATIVE FROM ITS SALE OF TAXPAYERS' FRUIT WERE INCOME OF THE TAXPAYERS FOR TAX PURPOSES

- 1. The cooperative received the net proceeds not as owner but as the agent or trustee for taxpayers, or as a mere conduit for the money.**

The taxpayers did not sell their fruit to the cooperative, but delivered it to the cooperative for handling and marketing to others on a cooperative basis, that is, as the taxpayers' agent. *Oregon Growers Cooperative Association v. Lentz*, 107 Or. 561 at 579, 212 P. 811.

In the language of the Tax Court in *Harbor Plywood Corporation v. Commissioner*, 14 T.C. 158 at 161, affirmed, 187 F. 2d 734 (CA 9):

" . . . the selling association is an agent or trustee or mere conduit for the income."

The Standard Cooperative Growers Contract between the taxpayers and the cooperative expressly requires the cooperative to pay to the taxpayers "the net proceeds obtained by it for the fruit within thirty days after the receipt of the money for each pool of fruit" (Ex. 2), the "net proceeds" being the gross sales receipts by the cooperative less only its costs and charges for handling, storing and marketing, as specifically listed in the contract. Deductions from gross proceeds authorized by this patronage contract do not include any charge or deduction for any capital fund of the cooperative.

The cooperative was thus legally obligated to pay to the taxpayers, along with all other growers who were parties to such patronage contracts, the full net proceeds of the fruit sold by the cooperative. Such payment of the net margins was mandatory, and not discretionary with the Board of Directors. The taxpayers could have compelled the cooperative to pay to them the full amount of the net proceeds, under their patronage contract. *Hood River Orchard Co. v. Stone*,² 97 Or. 158 at 171, 191 Pac. 662 (1920); *Rhodes v. Little Falls Dairy Co., Inc.*, 230 App. Div. 571, 245 N.Y. Sup. 432, affirmed, 256 N.Y. 559, 117 N.E. 140 (1931).

It thus follows that when the cooperative applied a part of the net fruit sales proceeds to discharge the

² Construing the identical form of Apple Growers Assn. Cooperative patronage contract involved in the instant case. The cooperative's bylaw establishing the Building and Equipment Fund (Ex. 14, p. 12) was adopted after trial of the *Hood River Orchard Co.* case.

taxpayers' obligation, under the by-laws, to contribute to the Building and Equipment Fund, it was applying money which belonged to the taxpayers and not to the cooperative. *San Joaquin Valley Poultry Producers' Assn. v. Commissioner*, 136 F. 2d 382 (CA 9); *United Cooperatives, Inc. v. Commissioner*, 4 T.C. 93; *Harbor Plywood Corporation v. Commissioner*, 14 T.C. 158, affirmed, 187 F. 2d 734 (CA 9); *Bradshaw v. Commissioner*, 14 T.C. 162; *Midland Cooperative Wholesale v. Commissioner*, 44 B.T.A. 824.

It is now clear that even a non-exempt cooperative which is obligated under its patronage contract with its patrons to pay the net receipts or net margins to its patrons, may exclude such net receipts from its gross income in computing its own income tax. *Fruit Growers Supply Co. v. Commissioner*, 56 F. 2d 90 (CA 9). It is also well settled that a cooperative may exclude from its gross income the net proceeds which it is obligated to pay to its patrons even though such payment may be made, in the discretion of the cooperative, partly or wholly in capital stock or revolving capital credits. *Colony Farms Cooperative Dairy, Inc.*, 17 T.C. 688; *United Cooperatives, Inc. v. Commissioner*, *supra*. The basis for this result is expressed by the tax court, in *United Cooperatives, Inc. v. Commissioner*, *supra*, as follows:

"The result of the procedure set up in petitioner's (the cooperative's) by-laws was as if the stockholder member who was under obligation to purchase additional stock had received, in cash, the 'patronage dividend' and had thereupon applied this sum to payment of stock. The stock, when

thus paid and issued to him . . . represented an additional investment on his part to the capital of the corporation out of his savings from the annual transactions with petitioner."

Such is precisely the situation in the instant case. The cooperative here sold fruit grown and delivered to it by the taxpayers, and was obligated under its patronage contract to pay to the taxpayers the sales proceeds less only the cooperative's operating expenses. The taxpayers, however, had agreed as members of the cooperative to the by-law requirement that certain sums, based upon the amount of their fruit handled by the cooperative, be paid each year to a capital fund (Ex. 14; R. 29-30).³ Rather than insist upon full cash payment to them of the full net sales proceeds to which they were entitled, only to pay back to the cooperative the charges for the capital fund, the taxpayers acquiesced in the cooperative's application of a portion of those proceeds in satisfaction of the charge for the capital fund. In legal effect, the taxpayers received the full net proceeds of the fruit, and thereupon invested a portion thereof in the capital of the cooperative. *Phillips v. Commissioner*, 17 T.C. 1027 (1951). The cooperative set off the taxpayers' obligation under the by-laws to contribute to the capital fund against its own obligation under the patronage contract to pay to the taxpayers the full net proceeds of their fruit. Each of these independent obligations of the two parties was thus fully settled and discharged as to each year's crops.

³ *Davidson v. Apple Growers Ass'n.*, 159 Or. 473 at 482, 79 P. (2d) 991 (1938): "* * * all grower members are bound by the provisions of the members bylaws of defendant by reason of their relationship to defendant as grower members."

There arose therefrom, however, a *new* executory contract relationship. When the cooperative credited the taxpayers with their contribution to the capital fund, a relationship in the nature of a cooperative-investor status was created, involving new rights and obligations based not upon the taxpayers' status as patrons, but upon their status as owners of equity interests in the capital of the cooperative.⁴

Farmers Grain Dealers Assn. of Iowa v. U. S., 116 F. Supp. 685 (S.D. Iowa 1953), cited in the District Court's oral opinion (R. 53), does not support a conclusion that the sums contributed by the taxpayers to the cooperative's capital fund were income when refunded to the taxpayers, and not when originally contributed. It appears that the Iowa cooperative, unlike the Apple Growers Association, was not obligated to pay to its patrons the money which it withheld for its reserve, so that its patrons could not be said to have received that money as income under any applicable theory.

2. Income in the amounts contributed by the taxpayers to the Building and Equipment Fund was constructively received by the taxpayers in the years such contributions were made.

All elements of constructive receipt of income are here present. The cooperative was legally obligated to

⁴ "It is most important to realize that where the same individual is either (1) both a member and an investor, or (2) both a patron and an investor, or (3) a member and a patron and an investor, his rights and obligations in each capacity arise out of a different relationship than his rights and obligations in either of his other capacities." Nieman, *Multiple Contractual Aspects of Cooperatives' By-Laws*, 39 Minn. L. R. (January 1955) 135, 148.

pay the taxpayers within a specific time the full net proceeds of the sales of their fruit. The taxpayers could have demanded and enforced payment of the full net proceeds, without deduction of any capital fund charge. The taxpayers were not obliged to, but did, acquiesce in the cooperative's practice of setting off against its obligation to the taxpayers to pay to them the net proceeds of their fruit, their obligation to the cooperative to contribute to the Building and Equipment Fund. There was thus a constructive receipt of income to the taxpayers in the amount which they were entitled to receive in cash but which they permitted voluntarily to be applied upon their obligation to the capital fund. *Commissioner of Internal Revenue v. Scatena*, 85 Fed. 2d 729 (CA 9); *Acer Realty Co. v. Commissioner*, 132 Fed. 2d 512 (CA 8); *Herbert v. Commissioner*, 81 Fed. 2d 912 (CA 3); *Grise v. Commissioner*, 6 B.T.A. 743. These cases are clearly supported by the common law rule that when two debts are set off against each other by agreement, each is deemed to be paid to the extent of the setoff. *Robinson v. Linn*, 155 Or. 591, 65 P. 2d 669.

3. The taxpayers realized the economic benefit of the net proceeds of their fruit which were credited to the Building and Equipment Fund by the cooperative in satisfaction of the taxpayers' obligation to contribute to that fund.

In return for the application of their money to the Building and Equipment Fund, the taxpayers received not only the benefit of the discharge of their obligation to contribute to that fund, but also received Building

and Equipment Fund credits to their account on the books of the cooperative which entitled them to their pro rata share of the proceeds of the cooperative's assets in the event of dissolution or sale of the cooperative (Ex. 13, p. 13; Ex. 3, 4, 5, 6; R. 32).

The taxpayers thus clearly received the economic benefit of the portions of the net proceeds of their fruit which they did not physically receive but which were applied by the cooperative to its Building and Equipment Fund, and such proceeds were taxable income to the taxpayers irrespective of whether or not the actual financial benefit derived by the taxpayers therefrom was the equivalent of the money so contributed by them to that fund. *Helvering v. Horst*, 331 U.S. 112, 61 S. Ct. 144, 85 L. Ed. 75.

II.

THE CERTIFICATES OF CONTRIBUTION WERE NOT INCOME TO THE TAXPAYERS IN THE YEARS IN WHICH ISSUED

The defendant argued in the District Court that the certificates issued to the taxpayers in 1942 represented delayed receipts from the cooperative's marketing of the earlier crops and constituted ordinary income in the year 1942. The District Court held that such certificates did not constitute income in the year in which issued (R. 53, 71).

The certificates actually were mere receipts acknowledging prior contributions by the taxpayers to the Building and Equipment Fund. The patronage transactions between the cooperative and the taxpayers with

respect to their crops in the 1930s had been completed and fully settled long before issuance of the 1942 certificates. The certificates neither created nor satisfied any debt running from the cooperative to the taxpayers. The net proceeds of each crop had been paid in full to the taxpayers. No patronage refunds or net margins remained to be distributed, either in cash or in property. The "patronage contract" had been fully performed. The subsequent issuance of these certificates in no way modified, added to or otherwise affected those previously completed settlements.

Furthermore, no attempt has been made to assess a tax on the 1942 certificates. The period of limitations has run, inasmuch as the taxpayers did file a 1942 return (R. 39, 97).

Even if it could be said that the certificates did constitute a delayed non-cash distribution of net proceeds from the earlier sales of the taxpayers' fruit, they would not constitute income to the taxpayers in the years of issue, for they clearly had no fair market value at the time of issue or at any time thereafter (R. 105), and were non-negotiable, non-interest bearing, and could be assigned only with the membership in the cooperative to new members approved by the Board of Directors (R. 36-37, 144). *Caswell's Estate v. Commissioner*, 211 F. 2d 693 (CA 9, 1954); *Commissioner v. Carpenter*, 219 F. 2d 635 (CA 5, 1955).

III.

**THE CASH REFUNDS OF CAPITAL CONTRIBUTIONS
RECEIVED BY THE TAXPAYERS IN 1949 AND 1951
WERE NOT INCOME TO THE TAXPAYERS
IN THOSE YEARS**

- 1. The equivalent of the sums of money contributed by the taxpayers to the capital fund was income to them in the years such contributions were made, and could not be income again in a subsequent year.**

Inasmuch as the sums contributed by the taxpayers to the cooperative's capital fund were contributed from the taxpayers' taxable income of the years of such contributions, it follows that the cash refunds of those capital contributions paid to the taxpayers in 1949 and 1951 were not taxable to them as income in those years, for income is taxable as such only in the year in which earned as income. *Healy v. Commissioner*, 345 U.S. 278, 73 S. Ct. 671, 97 L. Ed. 1007; *Welp v. United States*, 201 F. 2d 128 (CA 8).

- 2. The sums of money contributed by the taxpayers to the Building and Equipment Fund were investments in capital, and the refunding thereof constituted a return of capital not taxable as income.**

The by-law of the cooperative establishing the Building and Equipment Fund required that fund to be used for capital purposes, and the fund has been so used (R. 29-30, 92). It is significant that each of the certificates issued pursuant to the later amended by-law is entitled "certificate of contribution to revolving capital fund".

Money paid to acquire something of permanent use or value in one's business is a capital investment. *Acer Realty Co. v. Commissioner*, 132 F. 2d 512 (CA 8).

This has been applied to contributions by members of cooperative associations to the cooperative's capital funds or capital reserves—such are considered as capital investments. *Maley v. Commissioner* 17 T.C. 260; *United Cooperatives, Inc. v. Commissioner of Internal Revenue*, 4 T.C. 93.

Finally, it is well settled that returns of capital are not taxable as income. *Burnet v. Logan*, 283 U.S. 404, 51 S. Ct. 550, 75 L. Ed. 1143; *Edwards v. Cuba Railroad Co.*, 268 U.S. 628, 45 S. Ct. 614, 69 L. Ed. 1124.

CONCLUSION

It is submitted that the sums paid to the taxpayers in 1949 and 1951 in refund of prior contributions to the cooperative's capital fund were not taxable income to the taxpayers in 1949 or 1951, but only in the years 1930, 1931 and 1935 through 1937 in which those sums had been realized from sales of taxpayers' fruit and contributed to the cooperative's capital fund, and that the taxpayers should be allowed to recover the taxes paid on the 1949 and 1951 capital refunds, as prayed in their complaint.

Respectfully submitted,

LAMAR TOOZE
ROBERT M. KERR
STUART W. HILL

Attorneys for Appellants

Portland, Oregon
April 1955

APPENDIX**STANDARD CO-OPERATIVE GROWERS
CONTRACT**

of the
APPLE GROWERS ASSOCIATION
of Hood River, Oregon

Adopted on the 4th day of April, 1914, by a mass meeting of the growers and readopted on the 16th day of April, 1914, by the Board of Directors of the Apple Growers Association.

THIS CONTRACT, made and entered into, in duplicate, this 9th. day of December, 1929, by and between the Apple Growers Association, a Co-operative Corporation of Hood River, Oregon, hereinafter called the Association, party of the first part and Forrest L. Moe of Hood River, Oregon, hereinafter called the Grower, party of the second part, in the manner following:

The said parties hereto, for and in consideration of the sum of One Dollar, to each in hand paid, the receipt whereof is hereby acknowledged and confessed, have and do agree as follows, to-wit:

The said Grower hereby transfers and agrees to deliver to the Association his entire crop of merchantable apples, pears, strawberries and other fruits for the year 1929, and every year thereafter, continuously, provided that the Grower may cancel this contract on March 31st of any year by giving written notice to the Association on or before March 20th of such year that he desires the same cancelled, and delivering his copy of the contract to the Association and paying any indebtedness

due to the Association from the Grower. The failure of the Grower to so notify the Association and comply with the provisions aforesaid shall operate to continue this contract in force until such notification shall be given at the proper time, and the other stipulations aforesaid shall likewise be complied with.

The APPLE GROWERS ASSOCIATION is hereby expressly authorized to pledge, hypothecate or otherwise offer for collateral the fruit mentioned in this contract for the purpose of meeting the current expenses of the Association, including necessary harvesting expenses advanced the Grower.

The Grower agrees to haul and pack his fruit in accordance with the methods and rules prescribed by the Association and to deliver the same free of expense to the Association at Hood River—(or if delivered to any other shipping point, freight and switching charges to Hood River to be born by the Grower)—at such time as may be designated by the Association. The Grower further agrees to comply with and conform to all of the rules, regulations and requirements of the Association.

The Association agrees to handle and market the Grower's fruit with due diligence; and to pay the Grower such advances from time to time as sales warrant and to pay the balance of the net proceeds obtained by it for the fruit within thirty days after the receipt of the money for each pool of fruit; it being agreed by the parties that all fruit delivered hereunder shall be pooled by the Association with other fruit delivered under

similar contracts, according to size, tier, grade, variety and time of delivery, and that the proceeds of each pool shall be distributed by the Association pro rata among the growers having fruit in such pool. In case the Association shall pack the fruit, it shall be entitled to retain from the proceeds, as a packing charge, such sum as the Association shall from year to year determine. The Association shall be entitled to retain from the proceeds a further sum, not exceeding 10¢ per box, for the storage of such fruit as may be held and stored by it in Hood River County, Oregon, in cold storage, with the understanding that such storage charge is to be charged pro rata as against the entire variety so stored. The Association shall be entitled to retain from the proceeds of the fruit and products handled by it such further sum, as an advertising, handling, distributing and marketing charge, as the Association shall from year to year determine.

It is further agreed that for the year 1929 the Association shall retain as a handling charge not to exceed 10¢ per package for strawberries, pears and apples and 5¢ for peaches or cherries in 10 lb. packages. It is further agreed that each member of the Association shall receive the same price per box for the same variety, size and grade of fruit in each pool, and that no grower shall be charged more for the services rendered to him than other growers holding similar contracts are charged by the Association for similar services.

It is further agreed that the Association shall be entitled to withdraw from any pool fruit subject to any

defect impairing the value thereof, traceable to a diseased condition, which defect was not visible at the time of the receipt of the fruit, or was not noticed at such time, but developed later. Such fruit so withdrawn shall be handled by the Association on a separate account.

It is further agreed that this contract shall become operative and binding upon the parties hereto whenever two-thirds of the shippers with the Association, holding contracts with the Association in the form adopted in 1913, have executed the foregoing contract and not otherwise, in which event the said growers contract, adopted in 1913 between the parties hereto shall immediately terminate.

IN WITNESS WHEREOF, the Association has caused this contract to be executed by its duly authorized agent and the Grower has affixed his signature hereto this 9th day of December, 1929.

APPLE GROWERS ASSOCIATION

By /s/ Victor Follenius
 For the Association
 /s/ Forrest L. Moe
 Grower
 /s/ Edith B. Moe

MEMBERS BYLAWS OF APPLE GROWERS ASSOCIATION

(Exhibit 13)

ARTICLE X

* * * *

Section 7. *Building and Equipment Fund.* There is hereby created a permanent fund of an amount equal

to from nothing to five cents per package per annum on all fruit handled by the Apple Growers Association, commencing with the fiscal year beginning June 1st, 1919, of the standard grades of fruit on which the Association's handling and marketing charges, at the time this amendment was adopted, were ten cents per package, and a pro rata amount on all packages of fruit on which the Association's handling and marketing charges were more or less than ten cents per package, at the time this amendment was adopted.

Said fund so created, shall be known as the "Building and Equipment Fund," and shall be kept separate and apart from all other funds and moneys of the Association and shall be used exclusively for the purchasing of or paying for property, equipment or betterments, for the benefit of the Members of the Association in handling and marketing their fruit, and no portion of said fund shall be paid out in any other manner or for any other purpose than as stated herein.

The amount raised in any fiscal year for such "Building and Equipment Fund," shall be in the discretion of the Board of Directors; provided, however, the amount raised for such Fund shall not exceed in any fiscal year an amount equal to five cents per standard package of the fruit handled by the Association during such fiscal year.



No. 14623

In the
United States Court of Appeals
For the Ninth Circuit

FORREST L. MOE and EDITH B. MOE,
Appellants,

vs.

HUGH H. EARLE, Former Collector of
Internal Revenue at Portland, Oregon,
Appellee.

Brief of Amici Curiae in Support of Appellee

Appeal from the United States District Court for the District of Oregon.

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FILED

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In the

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For the Ninth Circuit

FORREST L. MOE and EDITH B. MOE,
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Internal Revenue at Portland, Oregon,
Appellee.

Brief of Amici Curiae in Support of Appellee

Appeal from the United States District Court for the District of Oregon.

THE INTEREST OF AMICI CURIAE

This brief is presented by Marion B. Plant and Bailey Lang as amici curiae and Brobeck, Phleger & Harrison of counsel. The parties to the appeal have consented to the filing of this brief, and copies of the consents have been filed with the Court in accordance with Rule 18, Part 9 of the rules of this Court.

This appeal raises important issues in the taxation of patrons of agricultural cooperatives, and the amici curiae present this brief at the instance of several such cooperatives, namely, the Challenge Cream and Butter Association, the California Lima Bean Growers Association, the California Date Growers Association, and the California and Hawaiian Sugar Refining Corporation, Ltd.

THE QUESTIONS INVOLVED

The facts of this case raise issues concerning the tax consequences of an important method of cooperative financing.

An agricultural cooperative exists for the purpose of marketing the products of its farmer-patrons. It receives the agricultural products produced by its patrons and markets them, returning to the patrons the net proceeds of the goods so marketed.

As this Court judicially knows, one of the important techniques employed by cooperatives to finance their operations is to withhold out of the sums which would otherwise become due to the patrons certain sums for reserves and capital improvements. Typically, the cooperative issues to the patron some sort of certificate disclosing the amount withheld, and from time to time the amount so withheld by the cooperative may be paid to its patrons in redemption of the certificates.

The question presented upon this appeal is whether the patron is taxable upon the withheld sum,

(a) at the time that it is deducted from the proceeds of the sale of his products, or

(b) at the time a certificate is issued evidencing the sum withheld (which may or may not occur in the same tax year as the sum is withheld), or

(c) when the certificate is redeemed.

In the present case the taxpayers did not include the sum withheld out of the proceeds of sale of their crops in their income tax returns for the year in which the withholding was made; neither did they report it on their income tax return for a subsequent year in which a certificate was issued evidencing the withholding. They did report it as income in the year in which the certificate was redeemed.

Thereafter they brought this suit for a refund of the tax, claiming that the tax was due in the year in which the withholding was made and not in the year in which the certificate was issued nor in the year in which the certificate was redeemed. The District Court held that the tax was due for the year in which the certificate was redeemed.

Amici curiae and the agricultural cooperatives for whom they are authorized to speak believe that the District Court properly decided the case and file this brief in support of that decision.

NECESSITY FOR AN AMICUS BRIEF

The rather unusual spectacle of a group of taxpayers causing a brief to be filed in support of the government in a tax case invites some explanation.

The explanation lies in the position taken by the government on this appeal. The government in its brief has stated that the decision of the lower court must be affirmed on the authority of the decision of this Court in *Caswell's Estate v. Commissioner*, 211 F.2d 693 (9th Cir. 1954). But the government has not presented any arguments in support of the decision in the *Caswell* case but, rather, has stated that decision is contrary to the position of the Internal Revenue Service. At least by inference, it invites this Court to overrule its earlier decision and to decide this case in favor of the taxpayer.

Amici curiae and the cooperatives for whom they are authorized to speak believe that the decision in the *Caswell* case is sound and that it is a correct application of tax accounting principles to patrons of agricultural cooperatives. Since the government does not seem disposed to support the decision of the lower court, amici curiae have filed this brief in support of the principles established by the *Caswell* case and others like it.

SCOPE OF THIS AMICUS BRIEF

The facts upon which this case must be decided, as shown by the record, are that the Apple Growers Association, an Oregon corporation operating as a cooperative, withheld out of the proceeds of the sale of the taxpayers' apples certain sums in the years 1930, 1931, 1935, 1936 and 1937. In 1942 the cooperative issued to the taxpayers certificates evidencing these past withholdings which had been placed in a Building and Equipment Fund. In 1949 the cooperative paid the face amount of certain of the certificates to the taxpayers in cash, and in 1951 it paid the face amount of the remaining certificates in cash.

The taxpayers included the cash amounts so received in their gross income for the years 1949 and 1951 which were the years in which the cash was distributed to them. They filed claims for refund of the tax paid on those amounts and sought recovery thereof in the District Court. The District Court held that the taxpayers properly included in their gross income for 1949 and 1951 the cash amounts received by them from the cooperative in those years on redemption of the certificates.

The interest of the amici curiae and the agricultural cooperatives for whom they are authorized to speak in this proceeding does not lie in the question of whether the decision should be affirmed or not. Indeed, they think it should be affirmed but that is only incidental to their real interest which lies in maintaining the broad principle that members and patrons of agricultural cooperatives are taxable upon sums withheld by the cooperative for necessary reserves and capital improvements only when the sums so withheld are paid out to the members. Conversely, they are interested in maintaining the proposition that the member-patron is not taxable upon the sums so withheld in the

year in which they are withheld or in the year in which certificates may be issued evidencing the amounts withheld.

THE STATUTES INVOLVED

Internal Revenue Code of 1939:

“Sec. 22. *Gross Income.*

(a) GENERAL DEFINITION. — ‘Gross income’ includes gains, profits, and income derived from salaries, wages, or compensation for personal service of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *” (26 U.S.C.A. 1952 ed. Section 22)

Internal Revenue Code of 1939:

“Sec. 42. *Period in Which Items of Gross Income Included.*

(a) GENERAL RULE.—The amount of all items of gross income shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under methods of accounting permitted under section 41, any such amounts are to be properly accounted for as of a different period * * *” (26 U.S.C.A. 1952 ed. Sec. 42)

DISCUSSION

We discuss, in turn, the considerations determining whether the sums withheld by a cooperative are taxable to patrons (a) in the year withheld; (b) in the year in which certificates are issued; or (c) in the year such withheld sums are paid to the patrons.

I. SUMS WITHHELD BY A COOPERATIVE FOR RESERVES ARE NOT TAXABLE TO PATRONS IN THE YEAR OF WITHHOLDING.

The patrons have not received the sums withheld. Why then should they be taxed as though they had? Taxpayers here advance three contentions to justify such a result.

(a) The first contention is that the cooperative received the proceeds of the sale of the members' products, not as owner, but as the agent or trustee for taxpayers, or as a mere conduit for the money—hence receipt by the cooperative is receipt by the members.

(b) The second contention is that the amounts withheld by the cooperative and added to the Building and Equipment Fund were constructively received by the members in the years such amounts were withheld.

(c) The third contention is that the members derived an economic benefit from retention of the portion of the proceeds added to the Building and Equipment Fund by the cooperative and therefore realized income in the years that such withheld sums were added to that fund.

These contentions will be discussed separately below.

A. The Conduit Theory Is Not Applicable to the Sums Lawfully Withheld, and Even if That Theory Were Applicable it Would Not Require That the Sums Withheld Be Included in the Gross Income of Members Until Made Available to Them.

1. THE MEMBERS DID NOT RECEIVE THE FULL PROCEEDS OF SALE AND THEN INVEST A PORTION IN THE BUILDING AND EQUIPMENT FUND.

Taxpayers contend that the Association was a mere conduit or agent for the net proceeds received by it from the sale of their fruit. This contention is set forth at page 14 of their brief as follows:

“The cooperative here sold fruit grown and delivered to it by the taxpayers, and was obligated under its

patronage contract to pay to the taxpayers the sales proceeds less only the cooperative's operating expenses. The taxpayers, however, had agreed as members of the cooperative to the by-law requirement that certain sums, based upon the amount of their fruit handled by the cooperative, be paid each year to a capital fund * * *. Rather than insist upon full cash payment to them of the full net sales proceeds to which they were entitled, only to pay back to the cooperative the charges for the capital fund, the taxpayers acquiesced in the cooperative's application of a portion of those proceeds in satisfaction of the charge for the capital fund. *In legal effect, the taxpayers received the full net proceeds of the fruit, and thereupon invested a portion thereof in the capital of the cooperative.*" (Emphasis added.)

This contention is, in fact, the heart of the taxpayers' position.

A similar contention was made in the case of *Commissioner v. Carpenter*, 20 T.C. 603 (1953) affirmed 219 F.2d 635 (5th Cir. 1955) where the court describes the government's contention as follows:

"* * * the Cooperative was under an obligation to distribute patronage dividends here in cash or certificates; * * * *The petitioner should be treated as if he had actually received the dividends in cash and reinvested the cash in the Cooperative.*" 20 T.C. 603 at 606. (Emphasis added.)

The Tax Court rejected this contention. On appeal to the Court of Appeals for the Fifth Circuit, 219 F.2d 635, 636, the Commissioner renewed his contention. Again it was rejected. It should be rejected here. We submit also that the contention assumes facts which are simply contrary to the facts of this case.

Taxpayers' rights *vis-a-vis* the Association are determined by two documents: the Standard Cooperative Growers Contract, and Section 7 (since repealed and replaced) of the Association's by-laws (Appellants' Br. pp. 21, 24). *The contract is made subject to the by-laws of the Association and hence, in effect, incorporates these by-laws by reference* (Appellants' Br. p. 22).

The contract provides for deductions for operating expenses from the proceeds of a grower's fruit, in arriving at the "net proceeds" to which he is entitled. While there is no specific mention in the contract of a deduction for the Building and Equipment Fund, there is a reference to the rules and regulations of the Association (Appellants' Br. p. 22) which would include its by-laws. Section 7 of the by-laws provides that the fund in question "is hereby created", and that an amount to be determined each year by the board of directors within certain limitations shall be "raised" (R. 56-57).

Taxpayers argue that they, the growers, were entitled to demand from the Association under the contract the full proceeds of sale without deduction of any amount for the Building and Equipment Fund even though they would be required, under Section 7 of the by-laws, to pay the identical amount to the Association as a contribution to the Building and Equipment Fund. In making this argument appellants overlook several pertinent points.

(a) *First*, This was one agreement, not two, because the grower contract incorporates and is made subject to the by-laws (Appellants' Br. p. 22). As a matter of general law, moreover, the contract would be deemed to incorporate the provisions of the by-laws whether or not this is done expressly. *Hayden v. Franklin Life Ins. Co.*, 136 F. 285 (8th Cir. 1905). Thus the rights of the growers under the con-

tracts are as much restricted by limitations found in the by-laws as by limitations appearing on the face of the contract.

(b) *Second*, the uniform practice of the parties was to raise the fund by means of deductions from the proceeds of the growers' fruit. Findings of Fact X (R. 58-59); Testimony of Robert B. Barker, Treasurer of the Association (R. 128-29). Thus the by-laws were construed in practice as permitting the board of directors to withhold from the proceeds amounts needed for additions to the Building and Equipment Fund. This is the obvious and natural way to raise such a fund.

(c) *Third*, this practical construction which the parties put upon their agreement is legally binding upon the members. It has been so held many times in a line of authority dating from *State ex rel. Farrell v. Conklin*, 34 Wis. 21 (1874). In that case, it was unclear from the by-laws whether the board of directors was authorized to hold meetings at other than a certain hour. The pleadings alleged that meetings had repeatedly been held at other hours, and the court said:

"* * * the practical construction put upon the by-law * * * must prevail * * * the facts admitted by the demurrer *bind the court to the practical construction of the by-laws given by the members of the society themselves, in acting upon it.*" 34 Wis. 21, 32. (Emphasis added.)

More recent cases to the same effect are, e.g., *Peters v. Minnesota Department of Ladies of G.A.R., Inc.*, 239 Minn. 133, 58 N.W. 2d 58 (1953); *Joy v. Ditto, Inc.*, 356 Ill. 348, 190 N.E. 671 (1934). It seems clear, therefore, that the growers could *not* have enforced payment to them of the sums deducted for the Building and Equipment Fund.

(d) *Fourth*, the Oregon laws explicitly contemplate and sanction a withholding for reserves, rather than full payment followed by investment in a "capital" fund:

"* * * The sums remaining for distribution to the members after paying operating expenses *and deducting sums for reserves* * * * shall be apportioned as dividends * * *". Ore. Rev. Stat. § 62.310 (1953)

(e) *Fifth*, this *very by-law* has been construed by the courts of the State of Oregon and been interpreted by them not to allow the members to recover from the Association amounts added to the Building and Equipment Fund. See *Davidson v. Apple Growers' Association*, 159 Ore. 474, 79 P.2d 991 (1938). In that case, a grower demanded money from the Association on several theories. The court held:

"It is an admitted fact that defendant deducted from the proceeds of the fruit crops in suit, for the nine years involved, the total sum of \$16,977.69 for its *building and equipment fund*. That is less than four cents upon each of the 435,114 packages delivered by * * * [the growers]. The members by-laws authorize a deduction of from 'nothing to five cents per package.' *Plaintiff has no ground of recovery in that respect.*" 79 P.2d 991 at 997-98 (Emphasis added.)

The contrast between legal theory and the actual facts is well illustrated by the transcript of testimony. Counsel for appellants contended:

"They [the growers] could have gone into the association and said, 'Here, our contract requires you to pay us the full net proceeds of our fruit without holding out anything for the Building and Equipment Fund.' They could have done that, and they would have prevailed, and the association would then have said, 'Okeh, but you owe us \$140 for the Building [74] and Equipment Fund.' They would have just exchanged money." (R. 148)

Against this contention by counsel stands the testimony of Appellants' own witness, Robert B. Barker, treasurer of the Association, on cross-examination:

"Q. In other words, the only right he [the grower] had to draw was the balance as shown on the account; is that correct?

A. That is correct.

Q. He did not have any right to withdraw the amount which had been deducted for the Revolving Capital Fund¹ account, did he?

A. *He did not.*

Q. He did not have any right to withdraw any amount which had been deducted for operating expenses?

A. He did not." (R. 158) (Emphasis added.)

In support of their position that the cooperative was required to remit to them the proceeds from the sale of the fruit without deduction for additions to the Building and Equipment Fund, the taxpayers cite *Hood River Orchard Co. v. Stone*, 97 Ore. 158, 191 P. 662 (1920). Taxpayers point out in their brief, however, (Appellants' Br. p. 12) that the *Hood River Orchard Co.* case was decided prior to the time the by-law establishing the Building and Equipment Fund went into effect. Hence that case clearly does not support the taxpayers' position.

The growers had no more right to demand the sums withheld for the Building and Equipment Fund than they did the amounts withheld for operating expenses. Yet no one, least

1. While the reference here is to the "Revolving Capital Fund", it is clear that the parties understood they were discussing the Building and Equipment Fund. Mr. Barker was being cross-examined regarding Exhibit 7 (R. 157) which referred to the growers ledger account discussed on direct examination in relation to the Building and Equipment Fund (R. 134-135). Also Mr. Barker stated it to be his understanding that the revolving capital fund includes the Building and Equipment Fund (R. 131).

of all Appellant growers, would contend that amounts withheld for expenses were income to the growers in the year withheld from their gross receipts. The growers had no dominion over these amounts; they were not entitled to demand them from the Association.

2. THE CONDUIT THEORY WOULD NOT, IN ANY EVENT, REQUIRE THE INCLUSION OF THE SUMS WITHHELD IN THE MEMBERS' GROSS INCOME.

Taxpayers rely on the cases of *San Joaquin Valley Poultry Producers Assn. v. Commissioner*, 136 F. 2d 382 (9th Cir. 1943); *United Cooperatives, Inc. v. Commissioner*, 4 T.C. 93 (1944); *Harbor Plywood Corporation v. Commissioner*, 14 T.C. 158 (1950), *aff'd.*, 187 F. 2d 734 (9th Cir. 1951); *Bradshaw v. Commissioner*, 14 T.C. 162 (1950); and *Midland Cooperative Wholesale v. Commissioner*, 44 B.T.A. 824 (1941).

Appellants cite the foregoing cases in support of a so-called "conduit" theory to the effect that the net proceeds of sale by the cooperative belong to its members. The conduit theory as developed in these cases, however, has to do with the taxation of cooperatives rather than their members. It allows certain allocations made to members to be excluded from the income of the non-exempt cooperative. The "conduit" theory has nothing to do with taxation of *members* and its application to members was rejected in the recent case of *Commissioner v. Carpenter*, 219 F. 2d 635 (5th Cir. 1955).

In the *Carpenter* case the Commissioner of Internal Revenue argued that the "conduit" theory applied to the facts involved in that case and that therefore the certificates there issued to the members pursuant to a pre-existing obligation were required to be included in the income of the

members. The Tax Court in that case (20 T.C. 603 (1953)) replied to this argument by stating that (20 T.C. 603, 607):

“The cooperative and its patrons are different entities and we do not think it necessarily follows that *what is excludable from the income of the cooperative, whether the cooperative be taxable or tax exempt, automatically becomes income to the member* * * * We confine ourselves to the problem before us. Is the petitioner here taxable on any amount represented by the certificates issued by the cooperative? The import of the decisions is that the member is not taxable unless the certificates have fair market value.” (Emphasis added.)

This Court in the case of *Caswell's Estate v. Commissioner*, 211 F. 2d 693 (9th Cir. 1954) likewise held that certificates issued to members of a cooperative were not taxable income to those members in the year issued to them. In that case this Court held that the certificates were not income for the reason that the rights evidenced by the certificates were subject to certain contingencies which so qualified the probability of any realization of cash by the members as to make it improper to impose a tax upon the receipt of the certificate.

The case of *Farmers Grain Dealers Ass'n. of Iowa v. United States* (S.D. Iowa 1953) 116 F. Supp. 685, *appeal dismissed*, 214 F. 2d 350 (8th Cir. 1954) is in accord with the decision of *Caswell's Estate v. Commissioner*. The District Court in that case held that the certificates issued to members, even though they were on the accrual basis of tax reporting, were not income to those members. The District Court found that redemption of the certificates was dependent upon a distribution by the cooperative of a

contingency reserve in the discretion of the board of directors.

Also in accord with the foregoing cases is *Halladay v. U. S.*, Volume 5 CCH 1955 Fed. Tax. Rep. ¶ 9637 (D.C. S.D. Calif. July 29, 1955) which holds that sums credited to the taxpayers' account in the revolving fund maintained by the Placentia Mutual Orange Association were not includable in the taxpayers' income.

The *Carpenter*, *Caswell*, *Farmers Grain Dealers Ass'n. of Iowa* and *Halladay* cases appear to us to be entirely correct and to be in accord with decisions of the Tax Court dealing with related issues. See *San Francisco Stevedoring Co. v. Commissioner*, 8 T.C. 222 (1947).

3. THE VACILLATION OF THE GOVERNMENT ON THE TAXATION OF MEMBERS OF COOPERATIVES.

The Government asserts in its brief (Appellee's Br. p. 8) that the *Carpenter* and *Caswell* decisions are "contrary to long established administrative practice of the Internal Revenue Service." It becomes apparent upon an examination of prior rulings that the administrative practice referred to is not "long established" nor has it been consistent. The Government's inconsistent and contradictory rulings provide no talisman for the answer to this problem, much less a reason for disturbing the well considered decision of this Court in the *Caswell* case.

The Government cites I. T. 3208, 1938-2 Cum. Bull. 127, which was promulgated in 1938, as an example of an early indication of the position of the Internal Revenue Service regarding the taxability of the members of cooperatives on non-cash patronage distributions (Appellee's Br., p. 9). I. T. 3208, however, dealt with the unusual provisions of the Iowa Code relating to cooperatives, and the ruling states

that "there is a distinction between the patronage dividends here involved and the payments ordinarily termed 'patronage dividends.'" Hence the ruling was by its terms not intended by the Internal Revenue Service to be of general application.

The Iowa Code precluded the payment of ordinary patronage dividends and required that the proceeds of patronage in excess of operating expenses be retained for addition to a revolving fund. The amounts added to the fund were credited to the accounts of members. These credits were payable only on liquidation of the association unless sooner called for redemption.

The foregoing ruling is inconsistent in at least two respects with the present position of the Internal Revenue Service. In the first place the ruling held that the credits to the accounts of members were themselves income to members, and that the "stated conclusion does not depend upon the issuance of participating certificates." 1938-2 Cum. Bull. 127, 129. The Internal Revenue Service now apparently takes the position that a withholding from the proceeds of members' crops is not income until certificates are issued to the members. See Income Tax Regulations 118 (September 26, 1953) Section 39.101(12)-2(b)(3).

I.T. 3208, moreover, provided that the credit on the books of the cooperative was taxable to members to the extent of the "value thereof." 1938-2 Cum. Bull. 127, 129. The *Carpenter* case is clearly consistent with this view. The Internal Revenue Service now apparently holds, however, that the sums withheld are taxable to members in the full amount regardless of the value of the rights accruing to the members with respect to such sums. See *Carpenter*, 20 T.C. 603, 606; Income Tax Regulations 118 (September 26, 1953) Section 39.23(a)-23(b).

The taxpayers in their brief, moreover (Appellants' Br., p. 8), make reference to a statement made by the Bureau of Internal Revenue to the president of the Apple Growers Association in the early 1940s and subsequent to the promulgation of I.T. 3208 to the effect that only cash distributions from the cooperative should be reported for income tax purposes.

Only as late as 1950 did the Internal Revenue Service appear for the first time to adopt the position that all non-cash patronage distributions in the form of capital stock or otherwise were taxable in full to the members of cooperatives to the same extent that such distributions would be taxable if paid in cash. *Income Tax Information Release No. 2*, dated April 13, 1950, set forth in Paragraph 6111 of Volume 5 of the CCH 1950 Federal Tax Reporter. Formal regulations adopting this policy were not issued until May 29, 1953. See T.D. 6014, 1953-1 Cum. Bull. 110. This policy is hardly, therefore, "long established."

As recently as the decision in the *Caswell* case (1954), moreover, the Commissioner has advanced views which are inconsistent with those set forth in the foregoing Income Tax Information Release. In proceedings before the Tax Court in the *Caswell* case itself the Commissioner of Internal Revenue did not rely on the "conduit" theory nor any other theory of constructive receipt but contended that the certificates there involved should be taxable under Section 111(b) of the 1939 Internal Revenue Code *to the extent of their fair market value*. 17 T.C. 1190, 1198. Yet in the *Carpenter* case the Commissioner argued before the Tax Court "that the revolving fund certificates should be taxable at their face amount *regardless of whether or not they had any fair market value at the time of their issuance*." 20 T.C. 603, 606 (emphasis added). Hence, over the years and until very

recently the position of the Internal Revenue Service has varied considerably regarding the taxability of non-cash patronage distributions.

Indeed, the record in the present case fully demonstrates the inconsistent position frequently taken by the Commissioner with regard to this issue. In this case, the Commissioner included certificates in the taxpayers' income for the year 1949 but yet contends in this case that the receipt of cash is the taxable incident. See Appellants' Br., pp. 7-8. Thus the Commissioner seems to be endeavoring to tax the cash and the certificates as well with respect to this particular taxpayer.

4. RECENT CASES ARE DIRECTLY CONTRARY TO THE CONTENTION OF APPELLANTS.

Apart from all of the foregoing, the taxpayers here are contending that the net proceeds from the sale of the fruit should be includable in their income even prior to the time when certificates are issued to them by the cooperative. It will be recalled that it is the position of the taxpayers that the income should be included by them in the years 1930, 1931 and 1935 through 1937 rather than in the year 1942 when the certificates were issued, or in the years 1949 and 1951 when the certificates were redeemed in cash. The position of the taxpayers is therefore inconsistent with the recent case of *William A. Joplin, Jr. v. Commissioner*, 17 T.C. 1526 (1952). In this case the taxpayer argued that the balance added to reserves by the cooperative, for which no certificates or any other evidences of indebtedness were issued, were includable in his income in the year the net proceeds were received by the cooperative and added to the reserve. This is essentially the same contention that is being made in the instant case. The Tax Court held that the sums

added to the reserves were not income to the taxpayer in that year. *George Bradshaw v. Commissioner*, 14 T.C. 162 (1950) and *Halladay v. U. S.*, Volume 5 CCH 1955 Fed. Tax Rep. ¶ 9637 (D.C. S.D. Calif. July 29, 1955) are to the same effect.

B. The Sums Withheld Were Not Constructively Received by the Appellants in the Years of Withholding.

The contention of the taxpayers (Appellants' Br., pp. 15-16) that they constructively received the sums added by the Association to its Building and Equipment Fund in the years 1930, 1931 and 1935 through 1937 is essentially the same contention as was made under the "conduit" theory which has been discussed previously in this brief. Thus, the taxpayers state (Appellants' Br., p. 16):

"The taxpayers could have demanded and enforced payment of the full net proceeds, without deduction of any capital fund charge. The taxpayers were not obliged to, but did, acquiesce in the cooperative's practice of setting off against its obligation to the taxpayers to pay them the net proceeds of their fruit, their obligation to the cooperative to contribute to the Building and Equipment Fund. There was thus a constructive receipt of income to the taxpayers in the amount which they were entitled to receive in cash but which they permitted voluntarily to be applied upon their obligation to the capital fund." (Emphasis added.)

We have pointed out previously that the application of this theory to this case is simply unwarranted by the facts.

The reasons why taxpayers' assertion that they "could have enforced payment of the full net proceeds, without deduction of any capital fund charge" is contrary to the facts will be summarized below.

(a) *First*, there were *not* two separate obligations, one arising out of the growers contract and entitling the members to the full net proceeds, and the other arising out of Section 7 of the by-laws (R. 56-57) and requiring the members independently to "contribute" to the Building and Equipment Fund. The growers contract incorporated the by-laws by reference. (Appellants' Br. p. 22). Hence there was but one contractual obligation which was subject to Section 7 of the by-laws and the Association's right to withhold for the Building and Equipment Fund.

(b) *Second*, the consistent practice of the Association and the members was to raise the fund by means of deductions out of the proceeds from the sale of fruit. Findings of Fact X (R. 58). This course of conduct was a practical interpretation of Section 7 of the by-laws which established the fund (R. 56-57) and was legally binding on the members of the Association. *State ex rel. Farrell v. Conklin*, 34 Wis. 21 (1874).

(c) *Third*, the highest court of the State of Oregon has construed Section 7 of the by-laws as denying to members of this Association the right to recover amounts withheld for addition to the Building and Equipment Fund. *Davidson v. Apple Growers' Association*, 159 Ore. 474, 79 P.2d 991 (1938). This construction of the grower contracts and by-laws should be and is binding on the Appellants in this case. *Gallagher v. Smith*, 223 F.2d 218 (3rd Cir. 1955).

(d) *Fourth*, the Oregon Statutes permit a withholding from the proceeds received by the cooperative of amounts added to reserves. *Ore Rev. Stats.*, Section 62.310 (1953).

(e) *Fifth*, the testimony of the Association's treasurer in the District Court indicates that the members had no right to withdraw amounts which had been deducted for reserve funds (R. 158).

There is, finally, no evidence in the record which factually supports the Appellants' legal theory. The burden of proof was plainly on Appellants to establish a factual basis for the legal theory relied upon.

For all of the foregoing reasons the cases relied upon by Appellants to support their constructive receipt theory are not in point.

The case primarily relied upon by Appellants is *Acer Realty Co. v. Commissioner*, 132 F.2d 512 (8th Cir. 1942). In that case the tenant in taxpayer's building had advanced \$10,500 to the taxpayer. The rental which it was obligated to pay taxpayer was \$18,000 per year subject to an increase if certain additional building was completed during the year. The tenant paid \$9,300 during the year as rent and it was then agreed that the taxpayer would offset against the additional rent due its liability due the tenant. The entries carrying out this understanding were not made until the following year. It was held that the taxpayer constructively received the rental income even though the book entries had not been made. The Board of Tax Appeals found that: "The offset of one debt against the other was intended and petitioner had an absolute right to make it during the tax year." 45 B.T.A. 333 (1941) at 339. This finding was affirmed on appeal.

In the present case there are no separate debts which could be set off against each other. There is one contract, the growers contract, which during the years in question was subject to the by-laws; and Section 7 of the latter (R. 56-57) precluded the taxpayers from recovering amounts added to the Building and Equipment Fund.

Commissioner v. Scatena, 85 F.2d 729 (9th Cir. 1936) merely deals with the year in which a stock dividend was unqualifiedly subject to the demand of a stockholder so as to be included in that stockholder's gross income. It is not clear

in what respect this case supports the Appellants' position.

In *Herbert v. Commissioner*, 81 F.2d 912 (3rd Cir. 1936) the taxpayer was held taxable on a dividend which was, at his request, applied against his indebtedness to the corporation. This case is distinguishable from the present one for the same reasons given above in connection with the *Acer Realty Co.* case. *William B. Grise v. Commissioner*, 6 B.T.A. 743 (1927) is similarly distinguishable.

In short, the Appellants rely on authorities and on a legal theory which finds no factual support in the present record. They artificially reconstruct separate debts out of a contract right which the record shows to be indivisible. That contract right, moreover, has been judicially interpreted to entitle them to the net proceeds from the sale of their fruit *after* the deduction of additions to the Building and Equipment Fund. *Davidson v. Apple Growers' Association*, 159 Ore. 474, 79 P.2d 991, 997-998 (1938).

C. Members Realize No Such Economic Benefit as to Justify Inclusion in Their Gross Income of Sums Withheld for the Building and Equipment Fund.

This contention by the taxpayers (Appellants' Br. pp. 16, 17) reiterates to some extent their same argument to the effect that the right of the growers to receive the full net proceeds from their fruit was separate from their obligation to contribute to the Building and Equipment Fund. Thus the taxpayers contend that "in return for the application of their money to the Building and Equipment Fund" they received "the benefit of the discharge of their obligation to contribute to that fund" (Appellants' Br. p. 16). For reasons discussed at length elsewhere in this brief and which will not therefore be repeated here, this argument has no factual support whatsoever in the record.

The taxpayers contend also, however, that they derived an economic benefit from the "Building and Equipment Fund credits to their account on the books of the cooperative which entitled them to their pro rata share of the proceeds of the cooperative's assets in the event of dissolution or sale of the cooperative (Ex. 13, p. 13; Ex. 3, 4, 5, 6; R. 32)." Appellants' Br. pp. 16, 17.

But it is clear that the members of the Association derive no more "economic benefit" from an investment by the Association of a part of the proceeds of the sale of crops in plant and equipment than is derived by the ordinary shareholder of a corporation from the investment by that corporation of its retained earnings. Yet it never has been successfully contended that the shareholder of an ordinary corporation receives taxable income prior to the time dividends are paid or declared in cash or property. Such a contention was rejected many years ago. *S. R. Kelsey v. Commissioner*, 6 B.T.A. 1068 (1927).

Also rejecting the contention that the credits themselves are income is the case of *William A. Joplin, Jr. v. Commissioner*, 17 T.C. 1526 (1952).

Taxpayers cite the case of *Helvering v. Horst*, 311 U.S. 112, 61 S.Ct. 144 (1940). This case deals with the taxability to the donor of intra-family assignments of income. The "economic benefit" theory that it propounds is not therefore applicable in this case.

II. CERTIFICATES EVIDENCING THE SUMS WITHHELD ARE NOT INCOME TO THE MEMBER IN THE YEAR IN WHICH ISSUED.

The District Court held that the certificates issued to the taxpayers in 1942, evidencing withholdings in prior years, were not income to them in 1942. Such a holding was a necessary corollary to the holding of the District Court that the

cash received by the taxpayers in 1949 and 1951 upon redemption of the certificates was taxable income in the years of payment.

If the certificates were includable in the gross income of the taxpayers in 1942 then the taxpayers would be entitled to a tax basis for these certificates equal to the amount properly includable in their 1942 income, and this basis would offset the cash received in redemption of the certificates in 1949 and 1951. Thus in the case of *Ross v. Commissioner*, 169 F.2d 483 (1st Cir. 1948) the taxpayer had been credited with salary earned during the years 1927 through 1932. The withdrawal of the salary so credited was restricted until April of 1932. The taxpayer did not report the salary as income in his return for 1932, however, and when a part of that salary was actually withdrawn in cash in 1939 the Commissioner endeavored to include it in the taxpayer's gross income for that year. The Court of Appeals held that since the income was properly includable in the taxpayer's income in 1932 it was not includable in any subsequent year.

The District Court was correct therefore in specifically undertaking to decide the question of whether the certificates issued to the members in 1942 were taxable income to them in that year.

A. The Rights Evidenced by the Certificates Were Subject to Contingencies Which Preclude Their Inclusion in Taxpayers' Income.

The District Court in holding that the certificates were not taxable income follows the decision of this Court in *Caswell's Estate v. Commissioner*, 211 F.2d 693 (9th Cir. 1954) as well as the decisions by the Court of Appeals of the Fifth Circuit and the District Court for the Southern District of Iowa in the cases of *Commissioner v. Carpenter*, 219 F.2d

635 (5th Cir. 1955) and *Farmers Grain Dealers Ass'n of Iowa v. U. S.*, 116 F. Supp. 685 (S.D. Iowa 1953) *appeal dismissed* 214 F.2d 350 (8th Cir. 1954).

For the face amount of the certificates to be includable in the income of the cash-basis taxpayers they would have to represent cash or the equivalent of cash. Section 42(a) of the 1939 Internal Revenue Code, 26 U.S.C.A. 1952 ed. Section 42. To be the equivalent of cash, income must be "credited to the account of or set apart for a taxpayer" and must be such that it "may be drawn upon by him at any time." Income Tax Regulations 111, Section 39.42-2 (October, 1943).

It is well settled, of course, that any restrictions placed on the withdrawal of money by a cash-basis taxpayer preclude the constructive or other receipt of that income for tax purposes. See *Francis Metal Door and Window Corp. v. Commissioner*, 178 F.2d 405 (2nd Cir. 1950), *affirming* 7 CCH Tax Court Memorandum Case 755; *Charles M. Howell v. Commissioner*, 21 B.T.A. 757 (1930); *R. V. Board v. Commissioner*, 14 B.T.A. 374 (1928).

Thus in the *Francis Metal Door and Window Corp.* case the petitioner corporation set up on December 31, 1942 reserves in its ledger accounts designated "Reserve for Deferred Salaries" and "Reserve for Deferred Obligations." The amount set up in the former reserve represented the 1942 salary of two officers. Those officers had verbally agreed with a bank which had loaned money to the petitioner to receive only \$75.00 per week while the loan was unpaid. It was held that the salary credited to the reserve was not received by the officers for income tax purposes since its withdrawal by them was restricted. Said the Tax Court (7 CCH Tax Court Memorandum Case 755, 759):

"To say that the items entered into these reserve accounts were during 1942 'made available' * * * so that

they might 'be drawn at any time' * * * is a direct contradiction of terms in association with the word 'reserve.' ”

The foregoing case was affirmed *per curiam* by the Court of Appeals for the Second Circuit. 178 F.2d 405 (2nd Cir. 1949).

It is clear that the certificates issued to the Appellants in 1942 were not the equivalent of cash nor could the amounts designated in the certificates be withdrawn by them at will. The certificates provided on their face (Appellants' Br. p. 6) that they would be refunded "when and if the Board of Directors shall determine to refund same." The certificates further stated that (Ex. 8, 9, 10, 11, 12) :

"The time and amount of any refund upon this certificate is and shall be within the discretion of the Board of Directors of Apple Growers Association and the rights hereunder are and will be governed by the members' by-laws of said Association and the holder hereof will and does accept same subject to those conditions and with that knowledge."

Thus payment of the certificates was clearly contingent on action taken at the discretion of the Board of Directors of the Association in redemption of them.

It was held in the *Farmers Grain Dealers Ass'n of Iowa* case (116 F. Supp. 685), cited above, that the certificates there involved were not includable in the income of an accrual basis taxpayer. The District Court held that the taxpayer in that case "should not be compelled to accrue as income an amount which is unsettled or the availability of which to him is so highly contingent." 116 F. Supp. 685, 688. The latter assertion is in accord with the general rule to the effect that accrual is proper only where there is "no contingency or unreasonable uncertainty qualifying the pay-

ment or receipt, as the case may be.” 2 Mertens, *Law of Federal Income Taxation* (1955 ed.) 128. The Tax Court has also held that a fund, the payment of which was to be made to the intended recipients as and when the board of directors of an association administering that fund “feels that conditions permit,” was not accruable as income. *San Francisco Stevedoring Co. v. Commissioner*, 8 T.C. 222 (1947).

If the certificates would not be income to an accrual basis taxpayer, *a fortiori*, they should not be income to a cash basis taxpayer.

B. The Certificates Have No Fair Market Value.

Absence of a “fair market value” for the certificates is another reason for excluding the certificates from income. *Commissioner v. Carpenter*, 219 F.2d 635 (5th Cir. 1955). It is clear that the certificates issued to the members of the Apple Growers Association in 1942 had no fair market value. Section 9(h) of the by-laws of the Association provide that (R. 64):

“* * * Said certificates shall not be evidence of any debt, shall not bear interest, shall give no voting rights, shall become null and void if the membership under which the ‘contributions’ were made shall be canceled, terminated or forfeited, and shall not be negotiable or assignable except to the purchaser of the membership under which the ‘contributions’ were made, together with a sale and conveyance of the premises to which the membership pertains and then only by consent of the board of directors and subject to any unpaid debt or obligation of the assignor * * *”

The certificates provided on their face, moreover, that they were redeemable only as and when the Board of Directors should determine to refund the same (Ex. 8, Ex. 9, Ex. 10, Ex. 11, Ex. 12).

The certificates are therefore substantially similar to those which were held to have no fair market value in the *Carpenter* case. The Court of Appeals stated as follows regarding the certificates there involved (219 F.2d 635, 636):

“These certificates were redeemable only in the sole discretion of the directors of the cooperative, were non-interest-bearing, were junior to all debts of the cooperative, and could be redeemed only upon written approval of the Columbia Land Bank, the mortgagee of the cooperative. The certificates admittedly had no fair market value when issued to the respondent.”

In the present case the certificates were subject to a restriction on their transfer more drastic than that involved in the *Carpenter* case, and this restriction alone would deprive them of any value. The certificates themselves were not assignable nor negotiable and hence nothing could be realized upon their transfer (Appellants' Br. p. 6). It has been generally held that the inability to realize cash upon the sale or pledge of a contractual obligation deprives that obligation of any fair market value. *D. M. Stevenson v. Commissioner*, 9 B.T.A. 552, 556 (1927); *Ravlin Corporation v. Commissioner*, 19 B.T.A. 1112, 1115 (1930).

The certificates in the *Carpenter* case were at least transferable with the consent of the board of directors of the cooperative there involved. 20 T.C. 603, 605. In the present case, however, only if the premises of the taxpayers to which their membership in the Association pertains are sold and conveyed do the certificates pass to the purchaser, and even such a sale or conveyance may be made only with the consent of the board of directors of the Association (R. 64).

It appears from the testimony in the District Court, moreover, that the certificates had no fair market value (R. 102-104).

III. THE CASH REDEMPTIONS OF PAST WITHHOLDINGS WERE INCOME TO THE TAXPAYERS IN THE YEARS OF PAYMENT.

It has been shown in Part I of this brief that the sums withheld from the sale of taxpayers' fruit for addition to the Building Fund were not includable in the income of the taxpayers for the years in which withholdings were made, i.e., 1930, 1931, 1935, 1936 and 1937.

In Part II of this brief it was shown that the certificates evidencing the withholdings of prior years were not income when issued to the taxpayers in 1942.

Accordingly, the years in which the sums withheld became taxable to the members are the years in which such sums finally were paid to them.

On grounds of policy alone it would appear proper to subject the taxpayers to an income tax only when the certificates are redeemed since it is only at this time that the taxpayers receive the money with which to pay the tax. It was truthfully pointed out centuries ago that "Every tax ought to be levied at the time or in the manner, in which it is most likely to be convenient for the contributor to pay it."² This observation particularly holds true at the present time when severe surtax rates, both individual and corporate, render extremely burdensome the raising of cash sufficient to make timely payment of federal income taxes. This burden should not be multiplied to the extent that taxpayers are required to pay taxes on income which they have not received or which they are unlikely to receive except possibly at some vague and indefinite future time. To do so would certainly approach, if indeed it would not exceed, the scope of the Sixteenth Amendment to the Federal Constitution. Cf.

2. Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, Part I, "Of Taxes".

Eisner v. Macomber, 252 U.S. 189, 40 S.Ct. 189 (1920) ; *Caswell's Estate v. Commissioner*, 211 F.2d 693 (9th Cir. 1954) at 696, note 17.

CONCLUSION

It is respectfully submitted that the taxpayers are subject to income tax in 1949 and 1951 when certificates, issued to them in 1942 and evidencing withholdings in prior years, were redeemed by the Apple Growers Association, and that the decision of the United States District Court for the District of Oregon should be affirmed.

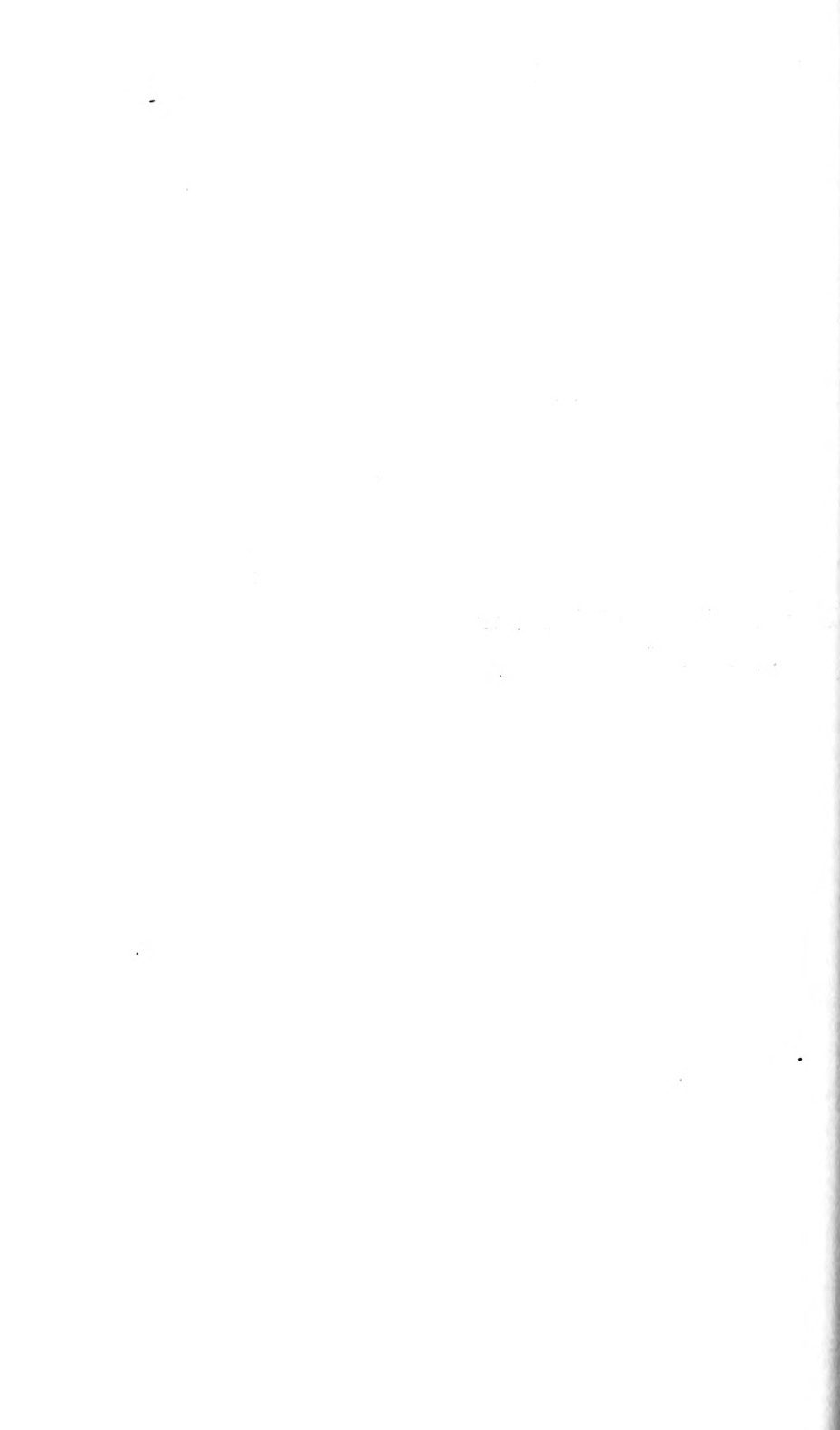
Dated: San Francisco, California, October 19, 1955.

MARION B. PLANT

BAILEY LANG

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Of Counsel



**In the United States Court of Appeals
for the Ninth Circuit**

FORREST L. MOE AND EDITH B. MOE, APPELLANTS

v.

**HUGH H. EARLE, FORMER COLLECTOR OF INTERNAL
REVENUE AT PORTLAND, OREGON, APPELLEE**

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON**

BRIEF FOR THE APPELLEE

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FILED

JUN 28 1955

PAUL P. CURRIEN, CLERK



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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14623

FORREST L. MOE AND EDITH B. MOE, APPELLANTS

v.

HUGH H. EARLE, FORMER COLLECTOR OF INTERNAL
REVENUE AT PORTLAND, OREGON, APPELLEE

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF OREGON*

BRIEF FOR THE APPELLEE

OPINION BELOW

The findings of fact and conclusions of law of the District Court (R. 52-71) are not officially reported.

JURISDICTION

This appeal involves income taxes in the amount of \$173.44 plus interest for the years 1949 and 1951 (R. 7, 11) which taxpayer¹ paid with his income tax returns for those years (R. 66, 69). Taxpayer filed timely claims for refund. (Exs. 29 and 30; R. 68, 70.) The

¹ For convenience Forrest L. Moe will be referred to as the taxpayer, although he and his wife Edith B. Moe filed joint income tax returns for the taxable years. (Exs. 26 and 28.)

Commissioner of Internal Revenue did not act on the claims for refund within six months after filing, and taxpayer's complaint in this action was filed in the District Court for the District of Oregon on July 17, 1953, more than six months after the filing of the claims for refund, and within the time provided in Section 3772 of the Internal Revenue Code of 1939, against the Collector for refund of amounts which had been allegedly included erroneously in the returns. (R. 3-21.) Jurisdiction was conferred on the District Court by 28 U.S.C., Sec. 1340. Judgment was entered in favor of the Collector on October 12, 1954. (R. 72-73.) Within 60 days and on November 10, 1954, taxpayer filed notice of appeal. (R. 73-74.) Jurisdiction is conferred on this Court by 28 U.S.C., Sec. 1291.

QUESTION PRESENTED

In 1942 a cooperative marketing association issued and delivered to taxpayer certificates of contribution to its revolving capital fund on account of payments he had made in prior years for which no certificates had been issued. Did the District Court err in holding that taxpayer did not erroneously include in his income tax returns for 1949 and 1951 cash amounts received by him in those years from the association upon surrender for cancellation of these certificates of contribution?

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.* — "Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal serv-

ice, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

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(26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT

The facts as contained in the findings of fact of the District Court (R. 55-70) may be summarized as follows:

Taxpayer is engaged in the business of growing and selling fruit in Oregon, and became a member of the Apple Growers Association of Hood River, Oregon, and a party to that Association's Standard Co-operative Growers Contract on December 9, 1929. The Association is a corporation operating as a nonprofit agricultural cooperative association of fruit growers with United States income tax exempt status under Section 101(12) of the Internal Revenue Code. (R. 55-56.)

A members' bylaw of the Association adopted in 1920, in effect when taxpayer became a member of the co-operative and until June 1, 1940, provided for a "Building and Equipment Fund" charge as follows (Ex. 14, pp. 32-33, R. 56-57):

Section 7. Building and Equipment Fund. There is hereby created a permanent fund of an amount

equal to from nothing to five cents per package per annum on all fruit handled by the Apple Growers Association, commencing with the fiscal year beginning June 1st, 1919, of the standard grades of fruit on which the Association's handling and marketing charges, at the time this amendment was adopted, were ten cents per package, and a pro rata amount on all packages of fruit on which the Association's handling and marketing charges were more or less than ten cents per package, at the time this amendment was adopted.

Said fund so created, shall be known as the "building and equipment fund," and shall be kept separate and apart from all other funds and moneys of the Association and shall be used exclusively for the purchasing of or paying for property, equipment or betterments, for the benefit of the members of the Association in handling and marketing their fruit, and no portion of said fund shall be paid out in any other manner or for any other purpose than as stated herein.

The amount raised in any fiscal year for such "building and equipment fund," shall be, in the discretion of the board of directors; provided, however, the amount raised for such fund shall not exceed in any fiscal year an amount equal to five cents per standard package of the fruit handled by the Association during such fiscal year.

The fruit delivered by the taxpayer to the Association during each of the years pertinent to this action was pooled by the Association with fruit of similar variety, size and other classifications, delivered by other growers. Upon disposal by the Association of

all fruit in a particular pool, that pool was "closed," and the Association recorded on a "Pool Closing Recap" sheet covering that pool the number of boxes of each grade and size included in that pool, and the price per box and total amount received therefor by the Association. Also recorded on the Pool Closing Recap were the rates and amounts of the Association's operating charges applicable to the fruit in that pool, and the rate and amount of the Building and Equipment Fund deduction applicable to that fruit. These deductions were debited, on the Pool Closing Recap, against the gross receipts by the Association shown thereon, and the "net credit" to the growers having fruit in that pool was thus determined and stated on the Recap sheet. Representative of such Pool Closing Recap Sheets is Exhibit 31. (R. 57-58.)

After the closing of each such pool in which the taxpayer had fruit, and the preparation of the aforesaid Pool Closing Recap for that pool, the Association prepared and delivered to the taxpayer, in accordance with its normal procedure as to all grower-members, a written "Pool Closing Statement" covering the taxpayer's fruit in that pool. Each of such statements to the taxpayer was on the same printed form as was used by the Association for its Pool Closing Recaps (Ex. 31) and set forth the same data as to the taxpayer's fruit as was set forth on the Pool Closing Recap as to all growers, i.e.: the number of boxes of each grade and size which the taxpayer had in that pool, the price per box and total amount received therefor by the Association, the rates and amounts of the Association's operating charges applicable to that fruit, and the rate and amount of the per-box Building and Equipment Fund deduction against the taxpayer.

These deductions were debited, on each of taxpayer's Pool Closing Statements, against the gross receipts of the Association shown thereon, and the "net credit" to the taxpayer from that pool was thus computed and stated on the Statement. No original or copy of any of the Pool Closing Statements to the taxpayer is now available, as the taxpayer some years ago destroyed his originals, and the Association destroyed its carbon copies in accordance with its general practice to keep such records seven years only. Along with each Pool Closing Statement the taxpayer received cash payment or credit by the Association of the amount of the net credit shown by that statement, being the sales prices received by the Association for the fruit covered by that statement, less the Association's operating charges, and less the per-box deduction for the Building and Equipment Fund. (R. 58-59.)

The total amount of the Building and Equipment Fund deductions calculated, according to the above by-law as to the taxpayer during each of the years pertinent to this action, and entered on the taxpayer's Pool Closing Statements are as follows (R. 59-60):

For Association's Fiscal Year	Amount	Year Charged to Taxpayer on Pool Closing Statements
1929-30	\$140.46	1930
1930-31	\$261.48	1931
1934-35	\$ 78.76	1935
1935-36	\$116.99	1936
1936-37	\$100.25	1937

Upon the closing of all pools for each of the fiscal years, the respective one of the total amounts was recorded and credited to the taxpayer on the Association's records. (Exs. 5 and 6; R. 59-60.)

On August 10, 1940, Article X of the Members' By-laws of the Apple Growers Association was amended

by adding thereto the following provisions (Ex. 14, pp. 11-15):

Section 9. Revolving Capital Fund, Budget, Certificates of Contribution, etc.

(a) Revolving Capital Fund, Limitation of Retains. The creation of a "revolving capital fund" of the Apple Growers Association, commencing with the fiscal year beginning June 1, 1940, is authorized in such an amount as in the judgment of the board of directors may be required, from time to time, to purchase and acquire real and personal property, to establish and maintain reserve funds and sinking funds, and for any proper capital purpose of an association in conducting its business properly, efficiently and economically when operating as a farmers' co-operative in purchasing supplies, and in handling, storing, processing and marketing orchard and farm products for its members; and which shall be in addition to and separate from the funds provided for in the "tentative operating budget" in Sections 1, 2 and 3, of said Article X of said Members' By-laws; but not exceeding the needs of the Association. Said "revolving capital fund" shall be created and maintained by existing funds, as hereinafter mentioned, and by the Association's withholding from the proceeds of sale of fruit and products handled by it of a percentage thereof to be determined by the board of directors. The amount so withheld each year shall be known as "contributions," and shall not exceed what would be the total of 5 cents per standard box for all apples, pears, cherries and strawberries, and 5 cents per

standard case or proportionate quantity, for all processed products handled by the Association during that year.

(b) Capital Fund Budget. During the month of July each year the board of directors shall cause a tentative capital fund budget to be prepared showing the percentage of proceeds and the total estimated amount thereof to be withheld as "contributions" to the "revolving capital fund" for that fiscal year, both divided into accounts conforming to the purposes stated in subdivision (a) of this Section 9, and clearly showing the amount and purpose of each account. A copy of said tentative capital fund budget shall be then mailed to each member. Said tentative capital fund budget may be amended by a two-thirds majority vote of all members present at their first meeting thereafter, but not later than during the month of August that year. The tentative capital fund budget shall be considered as approved and adopted by the members unless same shall be so amended. The budget as so prepared, or as so prepared and amended, shall be final and the basis for the retention of "contributions" for the fiscal year.

(c) Deductions For Other Capital Funds Discontinued. No further deductions shall be made or "contributions" required under the provisions of Section 7 of said Article X, providing for what is known as the "building and equipment fund"; or under the provisions of Sections 4, 5 and 6 of said Article X of the Members' By-laws, providing for what is known as the "purchasing fund"; or under the provisions of Section 8 and subdivisions (a) to (f) thereof, inclusive, adopted by the mem-

bers April 3, 1937, providing for what is known as the "revolving purchasing fund."

(d) Said portions of said Members' By-laws last above mentioned are not repealed or amended except as hereinafter provided, and nothing herein contained shall be construed as depriving any member or person of any right acquired under any of the said by-laws provisions. The funds accumulated under the said sections and subdivisions of sections of said by-laws, shall continue to be managed and used for the respective purposes provided for therein until same shall be refunded, as provided for herein. It is the intention to cause said "revolving purchasing fund" to operate and to be refunded hereunder in the same manner as provided for by the said Section 8 and subdivisions thereof adopted April 3, 1937.

(e) Administration of Revolving Capital Fund. The board of directors shall cause the following named funds, to-wit:

- (I) "Purchasing Fund"
- (II) "Revolving Purchasing Fund"
- (III) "Membership Fee Fund" and "Building and Equipment Fund," and
- (IV) "Revolving Capital Fund"

to be refunded to members in the above order in such an amount each year as in its judgment the best interests of the Association and its members may warrant, if any; but not exceeding for any fiscal year the amount of "contributions" received that fiscal year to the "revolving capital fund" hereby authorized; no refund shall be made to one who has canceled, terminated or forfeited the

standard growers contract or any renewal or continuation of any such contract which shall have been assigned in accord with the Members' By-laws, under which "contributions" were retained and accumulated. Subject to the above provisions for the order of refunding, the amount of each refund shall be prorated to the growers who contributed the earliest unrefunded "contributions" and no refund shall be made for any year until all "contributions" withheld during all prior years shall have been refunded in full or made payable by the board upon presentation of "contribution certificates" as herein provided.

(f) In creating, managing and refunding said "revolving capital fund" the board of directors shall have full discretion subject only to the provisions hereof.

(g) Expenditures from said "revolving capital fund" shall be made for capital investments and purposes and not for other purposes such as operating expenses and losses, etc. Said "revolving capital fund," or any portion thereof, shall not be paid out as a dividend or considered as, or be a part of any surplus in declaring a dividend, except by way of refunding, as herein provided.

(h) **Certificates of Contribution.** There shall be issued at the end of each fiscal year to each member who may have contributed to said "revolving capital fund," a certificate or certificates in form in accord herewith showing the net amount of his "contributions" and the year or years for which the "contributions" were withheld. Said certificates shall not be evidence of any debt, shall not bear interest, shall give no voting rights, shall be-

come null and void if the membership under which the "contributions" were made shall be canceled, terminated or forfeited, and shall not be negotiable or assignable except to the purchaser of the membership under which the "contributions" were made, together with a sale and conveyance of the premises to which the membership pertains and then only by consent of the board of directors and subject to any unpaid debt or obligation of the assignor. Nothing herein contained shall be construed as preventing title in such certificates passing by will or inheritance. The amount of said certificates may be paid in full or in part at any time, subject to the provisions hereof. Full payment shall be made only upon surrender of the certificates for cancellation. Part payment shall be made only upon presentation of certificates for endorsement of the payment thereon. Certificates issued under Section 8, adopted by the members April 3, 1937, shall be honored and paid under the provisions thereof. For convenience and administration purposes, the whole of the said various funds to be handled subject to the provisions hereof, may be called or known as parts of the "revolving capital fund."

On November 21, 1942, the Apple Growers Association issued and delivered to taxpayer "Certificates of Contribution to the Revolving Capital Fund," as follows (R. 65):

Certificate No.	Series	Fiscal Year of Contribution	Amount	
326	1929	1929-1930	\$140.46	(Exhibit 8)
326	1930	1930-1931	\$261.48	(Exhibit 9)
300	1934	1934-1935	\$ 78.76	(Exhibit 10)
301	1935	1935-1936	\$116.99	(Exhibit 11)
284	1936	1936-1937	\$100.25	(Exhibit 12)

On April 7, 1949, the following resolution was adopted by the board of directors of Apple Growers Association (Ex. 23, R. 65-66) :

That the 1929 and 1930 contributions to the Revolving Capital Fund be authorized for payment to members in good standing. Such payment of approximately \$100,000.00 to be made by the Treasurer as soon as necessary clerical work can be completed.

Pursuant to the foregoing resolution and bylaws, the Apple Growers Association on or about May 2, 1949, paid the sum of \$401.94, being the aggregate of the amounts stated on the two Certificates of Contribution to the Revolving Capital Fund No. 326, Series of 1929 and 1930, and the taxpayer surrendered the two certificates to the Association. (R. 65-66.)

Taxpayer did not include in any income tax return for a year prior to 1949 sums deducted against and credited to him by the Association for the Building and Equipment Fund nor any sum represented by the Certificates of Contribution to the Revolving Capital Fund, No. 326, Series of 1929 and 1930. (R. 67-68.)

On March 23, 1951, the following resolution (Ex. 24) was adopted by the board of directors of Apple Growers Association (R. 68) :

That the 1934, 1935 and 1936 Revolving Capital Fund contributions be authorized for payment to members in good standing. Such payment of approximately \$95,207 to be made by the Treasurer as soon as necessary clerical work can be completed but not later than May 15, 1951.

Pursuant to the foregoing resolution and bylaws, the Apple Growers Association on or about April 25, 1951, paid to taxpayer the sum of \$296, being the sum of the amounts stated on the three Certificates of Contribution to Revolving Capital Fund No. 300, Series of 1934; No. 301, Series of 1935, and No. 284, Series of 1936, and taxpayer surrendered each of the certificates to the Association. (R. 68-69.)

Taxpayer did not file with the Collector of Internal Revenue for the District of Oregon any income tax return for any of the years 1930, 1931, 1932, 1934, 1935, 1936 or 1937. Taxpayer did not include in any income tax return for any year prior to the return filed by him for the year 1951 the sums, or any part of the sums, which had been deducted against and credited to the taxpayer by the Apple Growers Association for the Building and Equipment Fund during the fiscal years 1934-35, 1935-1936, and 1936-1937, nor any sum as represented by the three Certificates of Contribution to the Revolving Capital Fund covering those fiscal years (R. 69-70).

On the basis of the foregoing facts, the District Court held that the amounts paid to the taxpayer in cash by the Apple Growers Association in 1949 and 1951 to redeem the "Certificates of Contribution to Revolving Capital Fund of Apple Growers Association—Hood River, Oregon," were income to the taxpayer in the years in which such payments were made and such certificates were redeemed, and that they were not income in the years in which such amounts were deducted from the sums of money payable to the taxpayer for his fruit, or in the year in which such certificates were issued to the taxpayer. (R. 70-71.) It consequently

held there was no error in taxpayer including in his income for 1949 and 1951 cash received in those years from the redemption of Revolving Capital Fund Certificates issued and delivered to him by the Apple Growers Association in 1942, and it dismissed taxpayer's complaint. From the judgment dismissing the complaint (R. 72-73) taxpayer has appealed to this Court (R. 73-74).

SUMMARY OF ARGUMENT

Under the decision of this Court in *Caswell's Estate v. Commissioner*, 211 F. 2d 693, taxpayer is not entitled to a refund for income tax paid on patronage dividends reported in 1949 and 1951 when certificates of contribution were redeemed.

ARGUMENT

No Refund Should Be Allowed for the Income Tax Paid on Patronage Dividends Reported in 1949 and 1951 When Certificates of Contribution Were Redeemed.

The sole issue in this case is whether taxpayer is entitled to a refund of income tax attributable to amounts paid by the cooperative to the taxpayer in 1949 and 1951, to redeem Certificates of Contribution to the cooperative's revolving capital fund issued to him in 1942, as receipts for payments taxpayer made in prior years. The taxpayer claims that he constructively received income in the prior years in which he made payments to the fund, but that he permitted the cooperative to apply these amounts on his obligation to the capital fund, without receiving the sums and paying them back again (Br. 11-16); and, therefore, that he erroneously included the amounts in his returns for 1949 and 1951, and should be entitled to a refund for those years.

Under the decision of this Court in *Caswell's Estate v. Commissioner*, 211 F. 2d 693, a member cash-basis patron of a cooperative realizes income only at the time of the redemption of patronage certificates, rather than when the amounts are allocated to him on the cooperative's books or at the time the Certificates of Contribution are issued to him. *Commissioner v. Carpenter*, 219 F. 2d 635 (C.A. 5th), is to the same effect.

In those cases, as in the present case, the cooperative was under a pre-existing obligation with respect to retained patronage dividends, after using whatever portion was necessary for authorized expenditures, to allocate the net margins remaining to the accounts of the respective patrons and to notify them of such allocation. In this case (after 1920), as in those cases, the board of directors of the cooperative was given discretion under the bylaws to retain amounts it determined necessary for capital purposes of the Building and Equipment Fund, up to a specified maximum sum, out of net proceeds due the patrons, and the patrons had no right to compel the distribution to them of such amounts in cash. (Ex. 14, pp. 32-33.) The case of *Hood River Orchard Co. v. Stone*, 97 Ore. 158, 191 Pac. 662, relied on by the taxpayer (Br. 12), is inapplicable since that case involved a cooperative-patron relationship existing prior to the adoption in 1920 of the bylaw authorizing the Building and Equipment Fund. In that case the patron was seeking to recover the balance of the selling price of fruit which it delivered to the cooperative under a contract which gave the association no right to withhold amounts for the creation of a surplus. The holding there was that the patron had not acquiesced in the business methods of the association in regard to creating the surplus.

The District Court's opinion here (R. 52-53, 70-71) is fully in accord with the *Caswell* and *Carpenter* decisions, *supra*, and if this Court should adhere to its previous decision in the *Caswell* case, the District Court should be affirmed.

The substance of the taxpayer's contention in this Court is, we believe, to seek a reconsideration of the *Caswell* decision. We would agree that that decision, as well as the *Carpenter* decision, *supra*, is contrary to long established administrative practice of the Internal Revenue Service and also is inconsistent with the reasoning of certain prior decisions of this and other courts relating to the exemption of certain cooperatives from income tax or to the exclusion of patronage refunds from their income. See I.T. 3208, 1938-2 Cum. Bull. 127; Income Tax Information Release No. 2, dated April 13, 1950 (1950 C.C.H., par. 6111); T.D. 6014, 1953-1 Cum. Bull. 110, 117-118; Rev. Rul. 54-10, 1954-1 Cum. Bull. 24; Senate Hearings on Revenue Act of 1951, Part 2, pp. 1251, 1286, 1419, 1420, 1426, 1428, 1429, 1430 and 1436.

CONCLUSION

If this Court should adhere to its decision in the *Caswell* case, *supra*, the District Court's holding that the redemption of the certificates constituted income to the taxpayer in 1949 and 1951, when the Certificates of Contribution were redeemed, should be affirmed and taxpayer's claim for refund denied.

Respectfully submitted,

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Attorney General.

CLARENCE E. LUCKEY,
United States Attorney.

JUNE, 1955.

APPENDIX

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22(a)-23 [as added by T.D. 6014, 1953-1 Cum. Bull. 110, 117-118]. ALLOCATIONS BY CO-OPERATIVE ASSOCIATIONS; TAX TREATMENT AS TO PATRONS.—(a) *In general*.—Amounts allocated on the basis of the business done with or for a patron by a cooperative association, whether or not entitled to tax treatment under section 101(12)(B), in cash, merchandise, capital stock, revolving fund certificates, retain certificates, certificates of indebtedness, letters of advice, or in some other manner disclosing to the patron the dollar amount allocated shall be included in the computation of the gross income of such patron for the taxable year in which received to the extent prescribed in (b) of this section, regardless of whether the amount allocated is deemed, for the purpose of section 101(12)(B), to be made at the close of a preceding taxable year of the cooperative association. The determination of the extent of taxability of such amounts is in no way dependent upon the method of accounting employed by the patron or upon the basis, cash, accrual, or otherwise, upon which the net income for such patron is computed.

(b) *Extent of taxability*.—(1) Amounts allocated to a patron on a patronage basis by a cooperative association with respect to products marketed for such patron, or with respect to supplies, equipment, or services the cost of which was deductible by the patron under section 23, shall

be included in the computation of the gross income of such patron to the following extent:

(i) If the allocation is in cash, in the amount of cash received.

(ii) If the allocation is in merchandise, to the extent of the fair market value of such merchandise at the time of receipt by the patron.

(iii) If the allocation is in the form of capital stock, revolving fund certificates, certificates of indebtedness, letters of advice, retain certificates, or similar documents—

(A) To the extent of the face amount of such documents, if the allocation was made in fulfillment and satisfaction of a valid obligation of such association to the patron, which obligation was in existence prior to the receipt by the cooperative association of the amount allocated. For this purpose, it is immaterial whether such allocation was made within the time required by section 29.101 (12)-4(a)(ii).

(B) To the extent of the face amount of such documents, if the allocation was made with respect to patronage of a year preceding the taxable year from amounts retained as “reasonable reserves” under section 29.101-4(a).

(C) To the extent of the cash or merchandise received in redemption or satisfaction of such documents (except those which are negotiable instruments) at the time of receipt of such cash or merchandise by the patron, where such allocation was not made in pursuance of the valid obligation referred to in

(A), above, or from amounts retained as "reasonable reserves" under section 29.101 (12)-4(a), referred to in (B), above. Where, in such case, the documents allocated are negotiable instruments, such documents shall be includible in the income of the patron to the extent of their fair market value at the time of their receipt.

* * * * *

No. 14624

United States
Court of Appeals
for the Ninth Circuit.

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, Formerly Florence Lee,
Appellees.

Transcript of Record

**Appeal from the United States District Court
for the District of Oregon**

FILED

MAR 10 1955

PAUL P. O'BRIEN,

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—219-55

CLERK



No. 14624

United States
Court of Appeals
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NEW YORK LIFE INSURANCE COMPANY, a
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Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court
for the District of Oregon

Civil No. 7070

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

ARTHUR L. LEE, FLORENCE GRUSEN-
MEYER, Formerly FLORENCE LEE, and
ISABEL CLARK,

Defendants.

COMPLAINT FOR INTERPLEADER

Comes now the plaintiff and for its complaint in
interpleader alleges as follows:

I.

Plaintiff is a corporation organized and existing
under and by virtue of the laws of the State of
New York.

II.

The defendant, Arthur L. Lee, resides in and is
a citizen of the State of Oregon; the defendant,
Florence Grusenmeyer, formerly Florence Lee, re-
sides in and is a citizen of the State of California,
and the defendant, Isabel Clark, resides in and is a
citizen of the State of Oregon.

III.

The matter in controversy, exclusive of interest
and costs, exceed the sum of \$500.00.

IV.

Jurisdiction of this Court exists by virtue of the foregoing diversity of citizenship and by the amount in controversy (Sections 1332 (a) (1), 1335; Title 28 USC).

V.

Commencing on or about November 6, 1915, the defendant, Arthur L. Lee, was insured under a contract of life insurance issued by plaintiff and identified as Policy No. 4-860-276.

VI.

On or about July 31, 1926, defendant, Arthur L. Lee, and the defendant, Florence Grusenmeyer, formerly Florence Lee, were married.

VII.

Thereafter and on or about September 22, 1926, in compliance with the request of the defendant, Arthur L. Lee, the beneficiary under said contract of insurance was changed and the defendant, Florence Grusenmeyer, formerly Florence Lee, the then wife of the defendant, Arthur L. Lee, became the beneficiary under said contract of insurance.

VIII.

During the existence of the marriage relationship of the defendants herein, the defendants resided in the State of California.

IX.

Thereafter the defendants were divorced, but the defendant, Florence Grusenmeyer, formerly Flor-

ence Lee, continued to claim some right, title and interest in said contract of insurance.

X.

Plaintiff is informed and believes and therefore alleges that the claim of the defendant, Florence Grusenmeyer, is predicated upon the fact that she was at one time the wife of the defendant, Arthur L. Lee, and on the ground that the designation of her as beneficiary was irrevocable and the further ground that she has a community interest in the contract of insurance because some of the premiums thereon were paid with funds which were earnings of the marital community in the State of California.

XI.

On or about the first day of December, 1952, the defendant, Arthur L. Lee, demanded the cash surrender value of said policy which demand was refused by plaintiff because the defendant, Arthur L. Lee, failed to comply with the terms of said contract in that he failed to surrender the policy at that time and for the further reason that the defendant, Florence Grusenmeyer, was claiming an interest in said policy and did not join in the demand of the defendant, Arthur L. Lee.

XII.

On or about the 4th day of May, 1953, the defendant, Arthur L. Lee, commenced an action against plaintiff in the Circuit Court of the State of Oregon and the County of Multnomah, wherein defendant, Arthur L. Lee, demanded judgment for

the cash surrender value of said policy, which said action is now pending.

XIII.

On or about March 1, 1945, the defendant, Arthur L. Lee, designated the defendant, Isabel Clark, as the beneficiary of said policy and defendant, Isabel Clark, is presently the beneficiary of said policy.

XIV.

Plaintiff is informed and believes and therefore alleges that the claim of the defendant, Isabel Clark, is predicated upon the fact that she is the present beneficiary under said policy, and upon the claim that said policy is presently a paid up policy and that defendant, Arthur L. Lee, is not now entitled to the cash surrender value of said policy.

XV.

Each of the defendants, Arthur L. Lee and Florence Grusenmeyer, has claimed that he or she is the only person entitled to receive payment of the proceeds of \$1,711.25, the cash surrender value of said policy, and the defendant, Isabel Clark, claims some right, title and interest in said policy.

XVI.

Plaintiff stands indifferent as to the respective claims of the defendants hereinabove set forth, and since the demand for the cash surrender value of said policy by said defendant, Arthur L. Lee, has been a mere stakeholder of said proceeds in the sum of \$1,711.25, in which plaintiff claims no beneficial interest; but in view from the conflicting claims of

said defendants, plaintiff cannot determine without hazards to itself to which of said defendants and in what amount said proceeds should be paid.

XVII.

Plaintiff has deposited in the registry of this Court, simultaneously with the filing of this complaint the sum of \$1,711.25, being the proceeds payable under said contract of insurance, and to abide the judgment of this Court as to which of said defendants and in what amounts the same is to be paid.

Wherefore, plaintiff prays that the Court adjudge:

1. That the defendant, Arthur L. Lee, be restrained from prosecuting the action now pending against plaintiff in the Circuit Court of the State of Oregon for the County of Multnomah, until this cause is finally adjudicated.

2. That the defendant, Florence Grusenmeyer, be restrained from instituting any action against plaintiff for the recovery of the proceeds of said contract of insurance or any part thereof.

3. That the defendant, Isabel Clark, be restrained from instituting any action against plaintiff for the recovery of the proceeds of said contract of insurance or any part thereof.

4. That the defendants be required to interplead and settle among themselves their respective claims to said proceeds.

5. That plaintiff be discharged from all liability in the premises.

6. That the plaintiff have and recover its costs and disbursements herein incurred and a reasonable attorney's fee out of said sum of money deposited in the registry of this Court.

DAVIS, JENSEN & MARTIN,

By /s/ DONALD W. McEWEN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed July 14, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT ARTHUR L. LEE

Comes now Arthur L. Lee, one of the defendants in the above-entitled action, and for his answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of said complaint.

II.

Answering Paragraph II, admits that Arthur L. Lee and Isabel Clark are residents and citizens of the State of Oregon; that this answering defendant has no knowledge or information sufficient to form a belief as to the truth or falsity of the other allegations, things or matters contained in said Paragraph II and therefore denies the same.

III.

Admits the allegations contained in Paragraphs III, IV and V.

IV.

Denies the allegations, things and matters contained in Paragraphs VI, VII, VIII, IX and X and the whole thereof, except as hereinafter expressly admitted or qualified.

V.

Admits that on or about the 1st day of December, 1952, this answering defendant demanded the cash surrender value of said policy from the plaintiff and said demand was refused and denies each and every other allegation, thing and matter contained in Paragraph XI and the whole thereof, except as hereinafter expressly admitted or qualified.

VI.

Admits the allegations contained in Paragraph XII and alleges that in addition to said cash surrender value of \$1,711.25, this answering defendant, as plaintiff in said action pending in the Circuit Court of the State of Oregon, County of Multnomah, has demanded judgment against the plaintiff herein, as defendant therein, interest at the rate of 6% per annum on said sum from December 18, 1952, together with the further sum of \$1,750.00 as reasonable attorneys' fees.

VII.

Admits the allegations contained in Paragraph XIII.

VIII.

Denies the allegations in Paragraph XIV and alleges that the defendant, Isabel Clark has and does assert no claim against the plaintiff herein for said policy or the proceeds thereof.

IX.

Answering the allegations contained in Paragraph XV, admits that this answering defendant, Arthur L. Lee, claims that he is the only person entitled to receive payment of the cash surrender value of said policy and denies each and every other allegation, thing and matter contained therein and the whole thereof.

X.

Denies each and every allegation, thing and matter contained in Paragraph XVI and the whole thereof.

And for a Further Affirmative Answer, Defense and Counterclaim This Answering Defendant Alleges:

I.

That the plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of New York and is engaged in the business of writing insurance.

II.

That on or about the 16th day of November, 1915, the plaintiff and this answering defendant agreed that for and in consideration of payments or premiums made and to be made in the future by this

answering defendant that the plaintiff would, upon this answering defendant's death, pay to any beneficiary designated by him the sum of \$3,000.00; that the parties thereto further agreed that this answering defendant should and did have the right to change such beneficiary and that such right was without reservation or qualification, and that this answering defendant might, without the consent of any beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon this answering defendant under the terms of said policy. That said agreement was incorporated in and represented by a policy of insurance issued by the plaintiff to this answering defendant, being plaintiff's policy No. 4-860-276.

III.

That the parties to said policy agreed and said policy provides in part as follows:

“Benefits on Surrender or Lapse—After two full annual premiums shall have been paid, the Insured (defendant) may within three months after any default in payment of premium, but not later, surrender the policy, and,

“(a) Receive the Cash Surrender Value less any indebtedness to the Company thereon. The cash Surrender Value shall be the reserve of this Policy, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any Paid-up Additions thereto, and any dividends standing to the credit of this Policy, less a surrender charge which in no case shall be more than one and one-half per centum of the sum insured. After

premiums have been paid for ten years or more there will be no surrender charge. The reserve will be computed according to the American Table of Mortality and interest at the rate of three per centum per annum * * *”

IV.

That this answering defendant entered into performance of said contract and made all payments and performed all terms, conditions and covenants by him to be performed under and by virtue of the terms of said policy.

V.

That on or about the 31st day of July, 1926, this answering defendant went through a marriage ceremony with the defendant presently known as Florence Grusenmeyer; that the said Florence Grusenmeyer was then and there unable and incapable of entering a valid contract of marriage for the reason that the said Florence Grusenmeyer, at said time, had a husband then living; that on or about the 22nd day of September, 1926, this answering defendant being then and there under the belief that the said Florence Grusenmeyer was his legal wife, requested the plaintiff herein to change the beneficiary to the said Florence Grusenmeyer, then known as Florence Lee.

VI.

That thereafter and on or about the 27th day of May, 1932, upon the request of this answering defendant, the plaintiff changed the beneficiary on

said policy from Florence Lee, designated as wife of defendant, to Reetha M. Shelly, friend; that on or about the 21st day of December, 1932, the said Florence Grusenmeyer, then known as Florence Lee, communicated with the plaintiff herein stating in substance that she did not consent to any transaction concerning said policy changing its terms or the beneficiary thereof.

VII.

Thereafter this answering defendant commenced a suit in the State of Oregon for the County of Multnomah, against the said defendant Florence Grusenmeyer, then known as Florence Lee, praying that the purported marriage between the parties should be declared null and void. That thereafter and on or about the 25th day of January, 1934, a decree was entered in said suit declaring the purported marriage, between this answering defendant and the said Florence Grusenmeyer, then known as Florence Lee, was a mere nullity and had no binding affect on either party and that the same was declared null and void *ab initio*.

VIII.

That thereafter and on or about the 27th day of June, 1937, with full knowledge of the alleged claim to said policy and the proceeds thereof by the said Florence Grusenmeyer, the plaintiff at the request of this defendant changed the beneficiary of said policy to Isabel Clark; that by such action the plaintiff herein waived any claimed rights it might have to refuse performance of the terms of

said contract because of any purported claim of the said defendant, Florence Grusenmeyer. That as the plaintiff well knew and knows, the said Florence Grusenmeyer at no time has had any right to the proceeds of said policy under and by virtue of its terms, or otherwise and that the alleged claim of the said Florence Grusenmeyer was and is without foundation in law or in fact. That this defendant furnished to the plaintiff documentary evidence establishing the facts concerning his marital status.

IX.

That subsequently, as hereinabove admitted and alleged, this answering defendant demanded the cash surrender value of said policy, which demand was refused by the plaintiff. That by its acts and conduct in so refusing to comply with the terms of said policy the plaintiff herein waived any and all requirements or formalities required by said policy incidental to the cancellation thereof or payment of such cash value. That subsequent to such demand and such refusal to pay said cash surrender value by the plaintiff and upon the refusal of this answering defendant to make any further or additional payment of premiums the plaintiff herein asserted, and continued to assert that said policy of insurance had by its terms been converted into temporary or extended insurance with no cash surrender value.

X.

That thereupon this answering defendant commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah, against

the plaintiff herein demanding judgment of and against the plaintiff herein for the sum of the cash surrender value, namely, \$1,711.25, together with interest thereon at the rate of 6% per annum, beginning December 18, 1952, until paid, together with the further sum of \$1,750.00, as reasonable attorneys' fees.

XI.

That the sum of \$1,750.00 is a reasonable sum to allow this answering defendant as attorneys' fees herein.

Wherefore, this answering defendant prays that the plaintiff take nothing by virtue of its complaint and that this action be dismissed with costs to this answering defendant, or in the alternative, that this answering defendant have judgment against the plaintiff herein for the sum of \$1,711.25, together with interest thereon at the rate of 6% per annum from December 18, 1952, and the further sum of \$1,750.00 attorneys' fees and for his costs and disbursements incurred herein.

/s/ ELTON WATKINS,

/s/ C. X. BOLLENBACK,

Attorneys for Arthur L. Lee,
Defendant.

Service of copy acknowledged.

[Endorsed]: Filed August 4, 1953.

[Title of District Court and Cause.]

ANSWER OF FLORENCE GRUSENMEYER,
FORMERLY FLORENCE LEE

Now comes the defendant Florence Grusenmeyer, formerly Florence Lee, and for answer to Plaintiff's Suit on file herein, admits, alleges and denies the allegations of said plaintiff's complaint, as follows, to wit:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X thereof.

II.

As to the allegations contained in Paragraph XI of Plaintiff's Complaint on file herein, this defendant has no knowledge or information relative thereto save and except that this defendant always has and does now claim an interest in the policy of life insurance which is the subject of this suit for the reasons set forth in Paragraphs VI, VII, VIII, IX and X of said Complaint, and has not and will not join in the demand of Arthur L. Lee, aforesaid.

Wherefore, defendant having fully answered, prays:

(a) That the amount in controversy, to wit: \$1,711.25, be awarded to this defendant pursuant to the assignment of the contract of life insurance set forth in Paragraph VII of Plaintiff's Complaint;

(b) That this Honorable Court decree that the

proceeds of the life insurance contract which is the subject of this controversy be awarded to this defendant pursuant to the community property laws of the State of California;

(c) For such other and further relief as may be meet, just and agreeable to equity.

Dated: San Francisco, California, September 14, 1953.

/s/ FLORENCE GRUSENMEYER,
Formerly Florence Lee,
Defendant.

/s/ A. M. BROUILLET,
Attorney for Defendant,
Florence Lee.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed September 15, 1953.

[Title of District Court and Cause.]

PRE-TRIAL ORDER ON ISSUE OF
INTERPLEADER

The above-entitled civil action having come on for pre-trial conference upon a segregated issue for the purpose of determining if the suit for interpleader may be maintained before the Honorable Claude McColloch, one of the Judges of this Court, plaintiff appearing by and through Theodore B. Jensen and Donald W. McEwen, of its attorneys, the defendant Arthur L. Lee appearing by and through C. X. Bollenback of his attorneys, and the defendants Florence Grusenmeyer, formerly Florence Lee, and Isabel Clark not attending said pre-trial conference. Whereupon the following proceedings were had:

Agreed Facts

The parties agreed that the following shall be accepted by the Court upon the trial as established facts and that no proof thereof shall be required:

I.

That plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of New York, and the defendants Arthur L. Lee and Isabel Clark are residents of the State of Oregon.

II.

That defendant Florence Grusenmeyer, formerly Florence Lee, is a resident of the State of California.

III.

The amount involved in this controversy exceeds the sum of \$500.00, exclusive of interest and costs.

IV.

That jurisdiction of this Court exists by virtue of the foregoing diversity of citizenship and by the amount in controversy (Section 1332a (1), 1335; Title 28 USC).

V.

That on or about the 16th day of November, 1915, the New York Life Insurance Company and the defendant Arthur L. Lee agreed that for and in consideration of payments or premiums made and to be made in the future by the said Arthur L. Lee, that the New York Life Insurance Company would, upon the death of the said Arthur L. Lee, pay to any beneficiary designated by him the sum of \$3,000.00; that the said Arthur L. Lee and the said New York Life Insurance Company further agreed that the said Arthur L. Lee should and did have the right to change the beneficiary under such insurance agreement and that the right to change such beneficiary was without reservation or qualification; the said New York Life Insurance Company and the said Arthur L. Lee further agreed that the said Arthur L. Lee might, without the consent of any beneficiary, receive benefit, exercise every right and enjoy every privilege conferred upon the said Arthur L. Lee under the terms of said insurance agreement. That the said insurance agreement further provided as follows:

Benefits on Surrender or Lapse.—After two full annual premiums shall have been paid, the Insured may within three months after any default in payment of premium, but not later, surrender the Policy, and,

(a) Receive its Cash Surrender Value less any indebtedness to the Company hereon. The Cash Surrender Value shall be the reserve on this Policy, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any Paid-up Additions thereto, and any dividends standing to the credit of this Policy, less a surrender charge which in no case shall be more than one and one-half per centum of the sum insured. After premiums have been paid for ten years or more there will be no surrender charge. The reserve will be computed according to the American Table of Mortality and interest at the rate of three per centum per annum;

VI.

That said insurance agreement was incorporated in and represented by a policy of insurance issued by the said New York Life Insurance Company to the said Arthur L. Lee, being Policy No. 4-860-276.

VII.

That prior to September 1, 1926, Florence Grusenmeyer, one of the defendants herein, was the wife of Frank E. Travers and was known as Florence Travers.

VIII.

That the said Florence Travers, now known as Florence Grusenmeyer, and the defendant Arthur L. Lee went through a marriage ceremony in the State of Nevada on the 31st day of July, 1926, and resided for some time in the State of California where community property laws exist.

IX.

That the New York Life Insurance Company Policy No. 4-860-276, in the name of Arthur L. Lee as insured had a net cash value on the 31st day of July, 1926, of \$208.23. At said time a loan of \$100.00 on said policy had been made to Arthur L. Lee.

X.

That a final decree of divorce in a suit then pending between the said Florence Travers and Frank E. Travers, in the Superior Court of the State of California for the County of Los Angeles, Dept. 3, Case No. D34430, was granted September 1, 1926, and entered of record September 3, 1926.

XI.

That on the 22nd day of September, 1926, Arthur L. Lee requested the New York Life Insurance Company to change the beneficiary to the said Florence Lee.

XII.

That thereafter and on or about the 27th day of May, 1932, upon the request of the said Arthur L. Lee, the New York Life Insurance Company changed the beneficiary on said policy from Florence

Lee, designated as wife of the defendant, to Reetha M. Shelley, designated as a friend.

XIII.

That on or about the 21st day of December, 1932, the said Florence Grusenmeyer communicated with the said New York Life Insurance Company herein stating in substance that she did not consent to any transaction concerning said policy, changing its terms or beneficiary thereof.

XIV.

That Arthur L. Lee, regularly and duly commenced a suit in the Circuit Court of the State of Oregon in the County of Multnomah against Florence Travers Lee, being case No. 110-286, for the annulment of the marriage between the said Arthur L. Lee and the said Florence Travers Lee. Service of summons was had on defendant Florence Travers Lee by publication. On the 25th day of January, 1934, a decree was entered in said suit declaring said marriage null and void from the beginning. Said decree did not determine any property rights between the parties.

XV.

That said policy of insurance above described, had a net cash value on the 25th day of January, 1934, of \$35.99; that at said time defendant Arthur L. Lee had borrowed on said policy the sum of \$550.00.

XVI.

That on or about the 7th day of June, 1937, with notice of the claim of defendant Florence Grusen-

meyer to said policy and the proceeds, the New York Life Insurance Company, at the request of Arthur L. Lee, changed the beneficiary of said policy to Isabel Clark, designated as friend.

XVII.

Subsequently and on or about the 1st day of December, 1952, Arthur L. Lee demanded of and from the said New York Life Insurance Company the cash surrender value of such policy in the amount of \$1,711.25, which demand the said New York Life Insurance Company refused.

XVIII.

That the consent of said Florence Grusenmeyer to the surrender of said policy was not furnished to plaintiff.

XIX.

That prior to the commencement of any litigation Arthur L. Lee furnished to the plaintiff certified copies of the various Court decrees herein mentioned determining the marital status of the said Arthur L. Lee and Florence Travers Lee Grusenmeyer.

XX.

That Arthur L. Lee had fully complied with the terms of the policy and paid all premiums due thereon up to November 6, 1952.

XXI.

That subsequent to such demand for said cash surrender value by the defendant Arthur L. Lee, he refused to make any further or additional payment of premiums to the New York Life Insurance

Company, and he failed to make payment of the premium which became due on November 6, 1952, and subsequent premium payments.

XXII.

That subsequently Arthur L. Lee commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah against the New York Life Insurance Company, demanding judgment of and against the said New York Life Insurance Company for the cash surrender value of said policy, namely \$1,711.25, together with interest thereon at the rate of 6% per annum, commencing December 18, 1952, until paid, together with the further sum of \$1,750.00 as reasonable attorneys' fees.

XXIII.

That thereafter the present suit was instituted by the plaintiff herein and the sum of \$1,711.25 was paid into the registry of this Court by the plaintiff herein.

XXIV.

That the defendant Isabel Clark has never made any demand on the New York Life Insurance Company or asserted any claim to the proceeds of said policy and has defaulted herein.

Plaintiff's Contentions

1. That the cash surrender value of said policy is \$1,711.25, the sum plaintiff paid into Court at the commencement of this suit for interpleader.

2. That defendant Arthur L. Lee and defendant Florence Grusenmeyer each claim that he or she

is the only person entitled to receive payment of the proceeds of \$1,711.25, the cash surrender value of said policy.

3. That plaintiff is indifferent as to the respective claims of defendants Lee and Grusenmeyer.

4. That plaintiff cannot determine without hazard to itself which of said defendants and in what amounts said proceeds should be paid.

5. That the claims of defendants Lee and Grusenmeyer are such as to support an order of interpleader herein.

6. That the defendants should be restrained from instituting or prosecuting any actions against plaintiff for the proceeds of said policy.

7. That defendants Lee and Grusenmeyer be required to interplead and settle among themselves their respective claims to said proceeds.

8. That plaintiff be discharged from all liability on said policy of insurance and said policy be surrendered and cancelled.

9. That plaintiff recover its costs and disbursements herein incurred and a reasonable attorneys' fee out of said sum of money deposited in the registry of this Court.

10. That the marriage of the defendants Lee and Grusenmeyer is claimed to be valid by defendant Grusenmeyer.

11. That the demand of the defendant Arthur L. Lee for the cash surrender value of the policy

would have been allowed if the defendant Florence Lee Grusenmeyer had consented thereto and if the policy had been surrendered in accordance with its terms and provisions.

12. That the defendant Florence Grusenmeyer has appeared by answer and response to request for admissions and alleged that she is entitled to the sum on deposit.

13. That the defendant Florence Grusenmeyer does not oppose the allowance of plaintiff's claim for an order of interpleader.

Defendant Lee denies these contentions.

Contentions of Defendant, Arthur L. Lee

Defendant, Arthur L. Lee's contentions are as follows:

1. That no valid or legal marriage was entered into between Arthur L. Lee and Florence Grusenmeyer, for the reason that the said Florence Grusenmeyer had, at the time of the attempted marriage ceremony between her and Arthur L. Lee, a husband presently living.

2. That no community ever existed between the said Arthur L. Lee and Florence Grusenmeyer and no community funds went towards the payment of the premiums of this policy.

3. That the net cash value, at the time of the annulment of said purported marriage between the said Arthur L. Lee and Florence Grusenmeyer was less than the net cash value of said policy at the

time of said purported marriage and there was no increase in the value of said policy during said purported marriage.

4. That under the terms of said policy the said Florence Grusenmeyer has no interest in said policy whether community funds were used for the payment of premiums or not; that the rights of the defendant, Arthur L. Lee, and the liabilities of the plaintiff are determined by the terms of said policy which give the said Arthur L. Lee exclusive control of said policy, free from any claimed equities of any other person whatsoever.

5. That the defendant Florence Grusenmeyer has no interest, legal or equitable, in and to said policy of insurance or the cash surrender value thereof.

6. That the defendant Florence Grusenmeyer has advised the plaintiff and the defendant, Arthur L. Lee, through her attorney of record, that she does not intend to appear further herein in support of her contentions or claims to said policy or the proceeds thereof.

7. That the plaintiff knew, or should have known that the alleged claim of the said Florence Grusenmeyer was unfounded in law or in fact and was frivolous and that no basis for a bona fide interpleader exists.

8. That the plaintiff, by changing the beneficiary of said policy first to Reetha M. Shelley, and then, after notice of the claim of Florence Grusenmeyer, to Isabel Clark, as aforesaid, waived any right to

assert a right to interplead the proceeds of said policy because of any alleged claim of the said Florence Grusenmeyer.

9. That no formal demand was ever made by the plaintiff to or upon the defendant, Arthur L. Lee, for the surrender of said policy; that the defendant, Arthur L. Lee offered to surrender said policy to the plaintiff if a receipt were given him therefor; that the plaintiff refused to give the said Arthur L. Lee a receipt for said policy and the said policy was retained by the said Arthur L. Lee; that by its refusal to pay such cash surrender value because of the alleged claim of Florence Travers Lee Grusenmeyer, the plaintiff waived all other and formal requirements of the policy provided in connection with the surrender thereof for its cash surrender value.

10. That subsequent to the demand for the cash surrender value of said policy and the refusal to pay the same by the plaintiff, and upon the refusal of Arthur L. Lee to make any further or additional payment of premiums, the plaintiff herein asserted, and continued to assert until the commencement of this suit, that said policy of insurance had, by its terms, been converted into temporary extended insurance with no cash or surrender value.

11. That by its action in seeking to convert said insurance contract into temporary or extended insurance, with no cash value, after refusal to pay said cash surrender value, the plaintiff herein took a position adverse to the defendant, Arthur L. Lee,

and was not disinterested or unbiased, and therefore no right to interplead exists.

12. That the plaintiff has not paid into the registry of this court, a sum sufficient to satisfy the claims of the defendant Arthur L. Lee, and before a right to interplead should be granted, plaintiff should be required to deposit in the registry of this court, a sum sufficient to satisfy such demands.

Plaintiff denies these contentions.

Issue

Does a right to interplead, with other appropriate relief, exist in favor of the plaintiff?

Exhibits

The parties have examined the pre-trial exhibits in this cause and hereby stipulate that they may be offered in evidence subject only to objection on the ground of relevancy and materiality.

Plaintiff's Exhibits:

1. Life insurance policy No. 4-860-276 issued by plaintiff on the life of defendant Arthur L. Lee in the face amount of \$3,000.00.

2. Copy of letter dated December 21, 1932, from defendant Grusenmeyer to plaintiff.

3. Copy of letter dated August 18, 1950, from Julian B. Brewer to plaintiff.

3A. Letter dated 1/7/51 from plaintiff to Elton Watkins, attorney for defendant Arthur L. Lee.

3B. Letter dated 9/15/50 from plaintiff to defendant Arthur L. Lee.

Defendant Arthur L. Lee's Exhibits:

4. New York Life Insurance Company Policy 4-860-276.

5. Letter from New York Life Insurance Company to Arthur L. Lee, dated March 5, 1951.

6. Letter from New York Life Insurance Company to Arthur L. Lee, dated December 18, 1952.

7. Letter from New York Life Insurance Company to Arthur L. Lee, dated January 13, 1953.

8. Letter from New York Life Insurance Company to Arthur L. Lee, dated June 5, 1953.

9. Letter from Richard C. O'Connor, attorney of record for Florence Grusenmeyer, dated October 28, 1953.

10. Certified copy divorce decree in Travers vs. Travers.

Order

It is ordered and agreed that this Pre-Trial Order will govern the course of the trial and will not be amended, except by consent or to prevent manifest injustice.

The Court, finding that the foregoing clearly and accurately reflects the pre-trial conference had

herein and the stipulations and agreements of the parties, hereby ratifies and confirms the foregoing proceedings in all things, and does hereby

Order that the Pre-trial Order be and the same hereby is incorporated into and hereby made a part of the record in this case for the purpose of controlling the course of proceedings on the formal trial hereof before the Court.

Dated this 30th day of September, 1954.

/s/ CLAUDE McCOLLOCH,
District Judge.

Approved:

/s/ DONALD W. McEWEN,
Of Attorneys for Plaintiff.

/s/ C. X. BOLLENBACK,
Of Attorneys for Defendant.

[Endorsed]: Filed September 30, 1954.

[Title of District Court and Cause.]

MEMORANDUM

It does not seem right to me that the insurance company could invoke Federal interpleader (under the circumstances here present) and thus avoid the State statute respecting attorney's fees. I will welcome authority, if there is any, on the point.

Dated: November 1, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed November 1, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come on for trial, upon the segregated issue of determining whether the plaintiff's suit for interpleader can be maintained, before the Honorable Claude McColloch, Chief Judge of this Court, plaintiff appearing by and through Theodore B. Jensen and Donald W. McEwen of its attorneys, the defendant Arthur L. Lee appearing personally and by and through Elton Watkins and C. X. Bollenback, his attorneys, and the defendants Florence Grusenmeyer, formerly Florence Lee, and Isabel Clark appearing not, neither personally nor by and through their attorneys, and,

Evidence having been adduced on behalf of the respective parties, arguments of counsel having been heard and considered and briefs submitted and considered, and the Court being fully advised in the premises, finds the following facts:

Findings of Fact

I.

That plaintiff is a corporation, organized and existing under and by virtue of the laws of the State of New York, and the defendants Arthur L. Lee and Isabel Clark are residents of the State of Oregon.

II.

That defendant Florence Grusenmeyer, formerly

Florence Lee, is a resident of the State of California.

III.

The amount involved in this controversy exceeds the sum of \$500.00, exclusive of interest and costs.

IV.

That jurisdiction of this Court exists by virtue of the foregoing diversity of citizenship and by the amount in controversy (Section 1332a (1), 1335; Title 28 USC).

V.

That on or about the 16th day of November, 1915, the New York Life Insurance Company and the defendant Arthur L. Lee agreed that for and in consideration of payments or premiums made and to be made in the future by the said Arthur L. Lee, that the New York Life Insurance Company would, upon the death of the said Arthur L. Lee, pay to any beneficiary designated by him the sum of \$3,000.00; that the said Arthur L. Lee and the said New York Life Insurance Company further agreed that the said Arthur L. Lee should and did have the right to change the beneficiary under such insurance agreement and that the right to change such beneficiary was without reservation or qualification; the said New York Life Insurance Company and the said Arthur L. Lee further agreed that the said Arthur L. Lee might, without the consent of any beneficiary, receive benefit, exercise every right and

enjoy every privilege conferred upon the said Arthur L. Lee under the terms of said insurance agreement. That the said insurance agreement further provided as follows:

Benefits on Surrender or Lapse.—After two full annual premiums shall have been paid, the Insured may within three months after any default in payment of premium, but not later, surrender the Policy, and,

(a) Receive its Cash Surrender Value less any indebtedness to the Company hereon. The Cash Surrender Value shall be the reserve on this Policy, at the date of default (omitting fractions of a dollar per thousand of insurance) and the reserve on any Paid-up Additions thereto, and any dividends standing to the credit of this Policy, less a surrender charge which in no case shall be more than one and one-half per centum of the sum insured. After premiums have been paid for ten years or more there will be no surrender charge. The reserve will be computed according to the American Table of Mortality and interest at the rate of three per centum per annum;

VI.

That said insurance agreement was incorporated in and represented by a policy of insurance issued by the said New York Life Insurance Company to the said Arthur L. Lee, being Policy No. 4-860-276.

VII.

That prior to September 1, 1926, Florence Grusenmeyer, one of the defendants herein, was the wife

of Frank E. Travers and was known as Florence Travers.

VIII.

That the said Florence Travers, now known as Florence Grusenmeyer, and the defendant Arthur L. Lee went through a marriage ceremony in the State of Nevada on the 31st day of July, 1926, and resided for some time in the State of California where community property laws exist.

IX.

That the New York Life Insurance Company Policy No. 4-860-276, in the name of Arthur L. Lee as insured had a net cash value on the 31st day of July, 1926, of \$208.23. At said time a loan of \$100.00 on said policy had been made to Arthur L. Lee.

X.

That a final decree of divorce in a suit then pending between the said Florence Travers and Frank E. Travers, in the Superior Court of the State of California for the County of Los Angeles, Dept. 3, Case No. D34430, was granted September 1, 1926, and entered of record September 3, 1926.

XI.

That on the 22d day of September, 1926, Arthur L. Lee requested the New York Life Insurance Company to change the beneficiary to the said Florence Lee.

XII.

That thereafter and on or about the 27th day of

May, 1932, upon the request of the said Arthur L. Lee, the New York Life Insurance Company changed the beneficiary on said policy from Florence Lee, designated as wife of the defendant, to Reetha M. Shelley, designated as a friend.

XIII.

That on or about the 21st day of December, 1932, the said Florence Grusenmeyer communicated with the said New York Life Insurance Company herein stating in substance that she did not consent to any transaction concerning said policy, changing its terms or beneficiary thereof.

XIV.

That Arthur L. Lee, regularly and duly commenced a suit in the Circuit Court of the State of Oregon in the County of Multnomah against Florence Travers Lee, being case No. 110-286, for the annulment of the marriage between the said Arthur L. Lee and the said Florence Travers Lee. Service of summons was had on defendant Florence Travers Lee by publication. On the 25th day of January, 1934, a decree was entered in said suit declaring said marriage null and void from the beginning. Said decree did not determine any property rights between the parties.

XV.

That said policy of insurance above described, had a net cash value on the 25th day of January, 1934, of \$35.99; that at said time defendant Arthur

L. Lee had borrowed on said policy the sum of \$550.00.

XVI.

That on or about the 27th day of June, 1937, with notice of the claim of defendant Florence Grusenmeyer to said policy and the proceeds, the New York Life Insurance Company, at the request of Arthur L. Lee, changed the beneficiary of said policy to Isabel Clark, designated as friend.

XVII.

Subsequently and on or about the 1st day of December, 1952, Arthur L. Lee demanded of and from the said New York Life Insurance Company the cash surrender value of such policy in the amount of \$1,711.25, which demand the said New York Life Insurance Company refused unless Florence Grusenmeyer consented thereto.

XVIII.

That the consent of said Florence Grusenmeyer to the surrender of said policy was not furnished to plaintiff.

XIX.

That prior to the commencement of any litigation Arthur L. Lee furnished to the plaintiff certified copies of the various Court decrees herein mentioned determining the marital status of the said Arthur L. Lee and Florence Travers Lee Grusenmeyer.

XX.

That Arthur L. Lee had fully complied with the

terms of the policy and paid all premiums due thereon up to November 6, 1952.

XXI.

That subsequent to such demand for said cash surrender value by the defendant Arthur L. Lee, he refused to make any further or additional payment of premiums to the New York Life Insurance Company, and he failed to make payment of the premium which became due on November 6, 1952, and subsequent premium payments.

XXII.

That subsequently Arthur L. Lee commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah against the New York Life Insurance Company, demanding judgment of and against the said New York Life Insurance Company for the cash surrender value of said policy, namely, \$1,711.25, together with interest thereon at the rate of 6% per annum, commencing December 18, 1952, until paid, together with the further sum of \$1,750.00 as reasonable attorneys' fees. That at the time of the institution of said suit and prior thereto plaintiff asserted an interest in and to said policy adverse to the said Arthur L. Lee, namely, that said policy had been converted to extended insurance without any cash value.

XXIII.

That thereafter the present suit was instituted

by the plaintiff herein and the sum of \$1,711.25 was paid into the registry of this Court by the plaintiff herein.

XXIV.

That the defendant Isabel Clark has never made any demand on the New York Life Insurance Company or asserted any claim to the proceeds of said policy and has defaulted herein.

XXV.

~~That the defendants Florence Grusenmeyer, formerly Florence Lee, and Isabel Clark, or either of them, have no interest in the proceeds of said policy; that the plaintiff, the new York Life Insurance Company, knew, or should have known, at the time of the institution of this suit that said defendants Florence Grusenmeyer, formerly Florence Lee, and Isabel Clark, or either of them, had no such interest in said policy or its proceeds and that any claim asserted by either of said defendants was sham and frivolous.~~

XXVI.

That the defendant Arthur L. Lee refused to surrender said policy to the plaintiff for the sole reason that plaintiff refused to give him a good and proper receipt therefor.

XXVII.

That the claim asserted against the plaintiff herein by the defendant Arthur L. Lee is greatly in excess of the amount deposited by the plaintiff in the registry of this Court.

XXVIII.

That to allow interpleader by the plaintiff in the instant case would deprive defendant Arthur L. Lee of rights under the policy and under the statutes of the State of Oregon to which he is entitled, namely, the recovery of interest, costs and attorneys' fees demanded by him against the plaintiff in the action pending in the Circuit Court of the State of Oregon for the County of Multnomah.

Based upon the foregoing Findings of Fact, the Court draws the following

Conclusions of Law

I.

That plaintiff is not entitled to interplead.

II.

That the within suit should be dismissed and the deposit heretofore made by the plaintiff in the Registry of this Court in the sum of \$1,711.25 should be returned to the plaintiff.

Dated this 15th day of November, 1954.

/s/ CLAUDE McCOLLOCH.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1954.

In the United States District Court for the
District of Oregon

Civil No. 7070

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

ARTHUR L. LEE, FLORENCE GRUSEN-
MEYER, Formerly FLORENCE LEE, and
ISABEL CLARK,

Defendants.

JUDGMENT

Based upon the Findings of Fact and Conclusions
of Law filed herein, and the Court being fully ad-
vised in the premises:

It Is Herewith Ordered that the above-entitled
action be, and the same hereby is, dismissed, and

It Is Further Ordered that the sum heretofore
deposited in the Registry of this Court by the plain-
tiff herein, in the amount of \$1,711.25, be returned
to the plaintiff herein, and

It Is Further Ordered that the defendant, Arthur
L. Lee, have judgment against the plaintiff herein
for his costs and disbursements incurred herein,
taxed at \$.

Dated this 15th day of November, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 15, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Arthur L. Lee, defendant, and C. X. Bollenback and Elton Watkins, attorneys for defendant, Arthur L. Lee; and to Florence Grusenmeyer, formerly Florence Lee, and R. C. O'Connor, attorney for defendant, Florence Grusenmeyer.

Notice is hereby given that New York Life Insurance Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final order and judgment entered in the above-entitled action on the 15th day of November, 1954, in favor of defendant, Arthur L. Lee, and against plaintiff.

Dated this 14th day of December, 1954, at Portland, Oregon.

DAVIS, JENSEN & MARTIN,
and
DONALD W. McEWEN,

By /s/ ROLAND DAVIS,
Attorneys for Plaintiff.

[Endorsed]: Filed December 14, 1954.

United States District Court
District of Oregon

Civil No. 7070

NEW YORK LIFE INSURANCE COMPANY, a
Corporation,

Plaintiff,

vs.

ARTHUR L. LEE, FLORENCE GRUSEN-
MEYER, Formerly FLORENCE LEE, and
ISABEL CLARK,

Defendants.

September 30, 1954

Before: Honorable Claude McColloch,
Chief Judge.

Appearances:

DONALD W. McEWEN, and
THEO. B. JENSEN,

Of Attorneys for Plaintiff.

ELTON WATKINS, and
C. X. BOLLENBACK,

Of Attorneys for Defendant.

TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS

Mr. McEwen: The parties have stipulated the pre-trial order may be amended by the addition of three exhibits. The Reporter has already marked

them and at the conclusion of the case we can enter those on the order itself.

Introduction of Exhibits

The following exhibits, identified in the pre-trial order, were thereupon received in evidence:

Plaintiff's Exhibits

No. 2—Copy of letter dated December 21, 1952, Defendant Grusenmeyer to Plaintiff.

No. 3—Copy of letter dated August 18, 1950, Julian B. Brewer to Plaintiff.

No. 3-A—Letter dated January 7, 1951, Plaintiff to Elton Watkins.

No. 3-B—Letter dated September 15, 1950, Plaintiff to Defendant Lee.

Defendants' Exhibits

No. 10—Certified copy of divorce decree, Travers vs. Travers.

No. 4—Life Insurance Policy, New York Life Insurance Company, No. 4-860-276, issued on the life of the Defendant, Arthur L. Lee, in amount \$3,000.

No. 5—Letter, New York Life Insurance Company to Arthur L. Lee, dated March 5, 1951.

No. 6—Letter, New York Life Insurance Company to Arthur L. Lee, dated December 18, 1952.

No. 7—Letter, New York Life Insurance Company to Arthur L. [2*] Lee, dated January 13, 1953.

No. 8—Letter, New York Life Insurance Company to Arthur L. Lee, dated June 5, 1953.

No. 9—Letter, New York Life Insurance Com-

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

pany to Richard C. O'Connor, Attorney of Record for Florence Grusenmeyer, dated October 28, 1953.

Mr. McEwen: The plaintiff has marked the policy as Plaintiff's Exhibit No. 1, and in the pre-trial order we reserved numbers for the policy, both No. 1 and No. 4. It has now been marked No. 4.

ARTHUR L. LEE

one of the defendants, produced as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Watkins:

Q. You are Arthur L. Lee, one of the defendants in this proceeding? A. Yes.

Q. You are the identical Arthur L. Lee, the identical man, [3] who received the policy from the New York Life Insurance Company, No. 4-860-276?

A. If that is the policy you have in your hand, yes.

Q. I am reading from the policy. A. Yes.

Q. Do you recall any circumstances, after you contacted me concerning your troubles with the New York Life, with reference to an attempted delivery of the policy? A. Yes, I do.

Q. Will you tell the Court briefly when it was, as near as you recall it, and where it was, and what occurred?

A. The time lapse of the policy was in December, and following right along there, rather early

(Testimony of Arthur L. Lee.)

in January, I think, in 1952, as near as I recall it, I appeared in the Portland office with the policy.

Q. What office? The office of what?

A. Of the New York Life Insurance Company, and signed a request for them to pay me the cash surrender value of the policy. I had the policy with me. They asked me to sign this request.

The policy was laying on the counter and at the time I asked for a receipt for the policy. I was refused a receipt. I told them I didn't wish to surrender the policy until I was given a receipt for it.

I had previously contacted you and asked you whether [4] or not I should and was advised by you not to give them the policy unless they gave me a receipt for the policy. I was tendering it and was perfectly willing to give it to them.

Q. What would have been the situation if they had given you a receipt? What would you have done?

A. I would let them take the policy right then. Immediately after, as I recall——

Q. What is that?

A. Immediately after that I brought the policy over and tendered it to you.

Mr. Watkins: You may cross-examine.

Cross-Examination

By Mr. McEwen:

Q. Do you remember the gentleman you discussed that with, the representative of the New York Life Insurance Company? Do you remember

(Testimony of Arthur L. Lee.)

his name?

A. I think it is the gentleman sitting over (indicating).

Q. His name is Mr. Krueger, is that correct?

A. I am not sure about his name. I saw various ones in the office.

Q. Isn't it a fact, Mr. Lee——

A. However, there are several there, and I have seen him in the office. As I recall, he is the individual.

Q. Your best recollection is that it was this gentleman right [5] here?

A. I think it was him.

Q. Didn't Mr. Krueger offer to give you a receipt and wasn't there some discussion as to what the terms of the receipt would be?

A. No, he definitely refused to give me a receipt for the thing.

Q. He definitely refused?

A. He said he couldn't give me a receipt. As I recall, his words were that he couldn't give me a receipt, I think something to that effect, that he had no authority to give me a receipt, or something like that. Anyway, I was refused a receipt for the policy.

Q. During the time you have been a policy holder of the company you had made certain loans from the company on the policy, had you not?

A. Yes.

Q. Did you have to surrender the policy at that time in order to obtain those loans? A. Yes.

Q. Did you get a receipt for the policy on those particular times?

(Testimony of Arthur L. Lee.)

A. As I recall, I had something to show that the policy was in their possession.

Q. You do not recall what it was? [6]

A. No. That has been several years ago.

Q. I appreciate that.

A. I don't recall the details.

Mr. McEwen: I believe that is all.

Mr. Watkins: That is all, your Honor.

(Witness excused.)

Mr. Watkins: That is our case on the facts.

(Recess.)

Mr. Watkins: May I ask Mr. Lee to take the stand for one question about that policy?

The Court: Yes.

ARTHUR L. LEE

one of the Defendants, having previously been duly sworn, was recalled and further testified as follows:

Direct Examination

By Mr. Watkins:

Q. Mr. Lee, prior to this time when you went to the New York Life Insurance Company office at Portland, Oregon, and the events concerning which you have just testified occurred, that you would not give up the policy unless they gave you a receipt, what is the fact, if it is a fact, as to the policy having been delivered before to the New York Life Insurance Company?

A. If I understand your question—— [7]

(Testimony of Arthur L. Lee.)

Q. Prior to this time.

A. Whenever I had a change of beneficiary and when I obtained a loan or paid a loan off, they sent the policy back to their home office to have that changed and the policy was tendered to them for that purpose.

Q. In connection with your several requests with respect to loans and changes of beneficiary, they complied with those requests, is that the situation?

A. I don't quite understand the question.

(Question read.)

A. Yes.

Q. (By Mr. Watkins): Was there any request made by you which the New York Life Insurance denied and thereafter returned to you your policy?

A. One request, yes. After I consulted you, I think you obtained photostatic copies of the decree of annulment and submitted those with the policy, asking them to take off that rider as to Florence Lee.

Q. Did they state the fact as to whether they would or would not take off that rider?

A. They would not take the rider off, no.

Q. I will hand you Exhibit No. 5 and I will ask you to look at it and state whether or not that letter is the one you referred to when you said they refused to take off the rider and returned you your policy? [8]

A. This apparently is the letter with reference to that, yes.

Mr. Watkins: You may cross-examine.

Mr. McEwen: No questions.

(Witness excused.)

Mr. Watkins: That is our case, your Honor. [9]

Plaintiff's Rebuttal Testimony

WILLIAM P. KRUEGER

produced as a witness on behalf of Plaintiff, in rebuttal, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McEwen:

Q. Your name is William P. Krueger?

A. Yes.

Q. By whom are you employed?

A. New York Life Insurance Company at the Portland office.

Q. In what capacity? A. As a clerk.

Q. How long have you been with the New York Life Insurance Company? A. 34 years.

Q. Have you met the gentleman who just testified, Mr. Arthur Lee? A. Yes.

Q. In the course of your duties as clerk for the company? A. Yes.

Q. Did you have some discussion with him concerning his request for the cash surrender value of the policy?

A. Well, I had waited on him when he came to the office, and I had him sign the surrender request.

Q. Was there any conversation relating to a receipt for the [10] policy, that you recall?

A. Yes. The company had their own form of

(Testimony of William P. Krueger.)

receipt, which I have brought up here. We make that in duplicate and the original is given to the insured. Of course, I offered to give him a receipt for the policy, but he also wanted to make some alterations on there, in case they refused to allow the cash value that the policy would be returned to him. I told him I was not authorized to make any changes in our form of receipt.

Q. Did you have any further conversation with him concerning a receipt?

A. Well, he would not surrender the policy under the conditions of the company's receipt, which is a printed form, so I took the surrender request—he kept the policy—and I forwarded the surrender request to the home office, stating that he refused to surrender the policy until settlement was made of the cash value.

Q. Is that form you tendered him the same form you have always used?

A. The same form we have always used; that is right.

Q. In receipting for a policy? A. Yes.

Q. This conversation took place approximately in January, 1952? A. Perhaps so. [11]

Q. In the Portland office? A. Yes.

Q. Do you have one of the form receipts?

A. Yes, I brought the pad along.

Q. Will you read the language contained in the receipt?

A. "New York Life Insurance Company, 51 Madison Avenue, New York 10, New York," and a

(Testimony of William P. Krueger.)

space for the date and the policy number.

“Received from”—and then we fill in the policy-holder’s name and address, and then it says, “Papers described below.”

Then, if they bring the policy in for surrender, we write, “Policy for surrender.”

If they bring it in for a loan, we write, “Policy for a loan,” or “Change of beneficiary,” or whatever it is.

The receipt continues: “Said papers are received without committing the company to any course of action in connection herewith and without prejudice to any of its rights.”

Then we put: “Portland branch office” and there is a line for the clerk to sign for the company.

Q. You actually sign on behalf of the company?

A. That is right.

Mr. McEwen: I believe that is all. [12]

Cross-Examination

By Mr. Bollenback:

Q. What is your capacity? A. A clerk.

Q. What was the request Mr. Lee wanted on that receipt?

A. Well, he wanted me to acknowledge receipt of the policy, but also that if the company refused to grant the cash value the policy would be returned to him.

Mr. Bollenback: Could we have a copy of the receipt which the witness has read?

Mr. McEwen: Just hand him the book.

Q. (By Mr. Bollenback): Did you consider this provision in that receipt that “Said papers are

(Testimony of William P. Krueger.)

received without committing the company to any course of action in connection therewith and without prejudice to any of its rights" was inconsistent with Mr. Lee's request that the policy be returned if the cash value was not paid?

A. No. I don't know of any reason why it should not be paid.

Q. You don't know of any reason why it should not be paid?

A. At that time I didn't know of this community property law that took place in California.

Mr. Bollenback: That is all.

Mr. McEwen: Step down. That is all the rebuttal, your Honor.

(Testimony closed.) [13]

Reporter's Certificate

I, Ira G. Holcomb, an Official Reporter of the above-entitled Court, do hereby certify that on September 30, 1954, I reported in shorthand the proceedings had in the above-entitled Court, and that the foregoing transcript, consisting of Pages 1 to 13, both inclusive, is a true, full and accurate transcript of said shorthand notes of said proceedings, so taken by me as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 11th day of January, 1955.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed January 11, 1955. [14]

(Testimony of William P. Krueger.)

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(Testimony of William P. Krueger.)

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A. No. I don't know of any reason why it should not be paid.

Q. You don't know of any reason why it should not be paid?

A. At that time I didn't know of this community property law that took place in California.

Mr. Bollenback: That is all.

Mr. McEwen: Step down. That is all the rebuttal, your Honor.

(Testimony closed.) [13]

Reporter's Certificate

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Dated at Portland, Oregon, this 11th day of January, 1955.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed January 11, 1955. [14]

PLAINTIFF'S EXHIBIT No. 2

1060 Bush Street,
San Francisco, Calif.

December 21, 1932.

New York Life Insurance Company,
Wells Fargo Bank Building,
1 Montgomery Street,
San Francisco, Calif.

Gentlemen:

For a number of years there has been in existence a policy which you issued insuring the life of Arthur L. Lee, my husband. The amount of the policy is \$3,000.00 and I am named as the beneficiary in the policy.

This is to inform you that I do not consent to a change of the beneficiary in said policy from myself to any other person, nor do I consent to any assignment of the policy for the purpose of a loan or otherwise, nor do I consent to the surrender of said policy. You are also further notified that I do not consent to the borrowing of any funds on said policy by Mr. Lee or any other person.

Will you please acknowledge receipt of this communication?

Yours very truly,

/s/ MRS. FLORENCE LEE.

Received December 22, 1932.

PLAINTIFF'S EXHIBIT No. 3

Julian D. Brewer
Attorney at Law
41 Sutter Street
San Francisco 4

August 18, 1950.

New York Life Insurance Co.,
One Montgomery Street,
San Francisco.

Arthur L. Lee, Insured.
Policy No. 4860-276.

Gentlemen:

I am the attorney for Florence Grusenmeyer, resident of this city and the former wife of the above-named policy holder. My client was divorced from him a number of years ago, and to avert unpleasantness she did not keep in touch with her former husband as to her rights under the policy but understands that it was in a form requiring her consent before she could be eliminated as the designated beneficiary thereof.

Mrs. Grusenmeyer states that she at no time consented to a change of beneficiary.

She was recently informed by a cousin of the policy holder that he died about 1947. Mr. Lee was a resident of San Francisco and the policy was taken out here, so far as Mrs. Grusenmeyer knows.

Please make inquiry, in the premises, of your head office and inform me of the exact situation.

Very truly yours,

/s/ JULIAN D. BREWER.

Received August 21, 1950.

PLAINTIFF'S EXHIBIT No. 3-A

New York Life Insurance Company
51 Madison Avenue
New York 10, N. Y.

(Copy)

January 7, 1951.

Elton Watkins, Esq.,
Failing Building,
Portland, Oregon.

Re: Policy No. 4 860 276.

Arthur L. Lee (JVP:mvy).

Dear Sir:

Your letter of December 6, 1951, has been referred to me.

It is my feeling that this Company cannot take the responsibility of determining the law and facts of this matter but that it is a problem to be settled by Mr. Lee and Mrs. Grusenmeyer. I do not think that this Company is in a position to completely disregard the notice of claim that she has filed with it.

On the other hand, I do not think that this necessarily calls for litigation. It may be that if her attorney is advised as to your claim, he and she might be willing to release all claim under this policy. If it would be helpful that I write to Attorney Brewer, I would be glad to do so if you would so advise me.

If she indicates a willingness to release her claim, I think it would suffice if we were furnished with a statement from her that she releases all claim to

any right, title or interest in this policy and authorizes the New York Life Insurance Company to consider that she has no interest in this policy.

Very truly yours,

FERDINAND H. PEASE,
General Counsel.

By,
JAMES V. PHELAN,
Attorney.

Received January 8, 1952.

PLAINTIFF'S EXHIBIT No. 3-B

Copy to Oregon Br.

September 15, 1950.

Mr. Arthur L. Lee,
Hereford Hotel,
2241 N.W. Hoyt St.,
Portland, Oregon.

Re: Pol. 4860 276.

Arthur L. Lee.

Dear Mr. Lee:

I am attaching hereto photostatic copy of a letter received from the attorney for your former wife, which is self-explanatory. I am also attaching photostatic copy of letter received from your wife in 1932, claiming a community interest in this policy. The Company's records indicate that you have designated Isabelle Clark as beneficiary of this policy. We believe it to be in your best interest and that of

any beneficiary to clear up any question of community interest at this time. In the event that you are able to reach an understanding with your former wife, you should have her execute the enclosed release of community interest form and forward it to the Company for recording.

If your wife has no community interest in this policy, please submit evidence to support your statement. It may be that the original Bill of Complaint makes mention of the fact or it may be mentioned in any copy of the interlocutory decree of divorce or in any final divorce decree. Then again there may be a separate community property settlement agreement which would bear out these statements.

Please know that the Company is most anxious to effect prompt settlement of claims with beneficiaries and it is for that reason that we are writing to you asking that you attempt to clarify the title of your policy at this time.

Your co-operation in this matter will be appreciated and if there is any further information desired please feel entirely free to write, directing your inquiries to my attention.

Sincerely,

.....,

Superintendent.

NEW YORK

LIFE INSURANCE COMPANY

By This Policy of Insurance Agrees to Pay

FACE
AMOUNT OF
THE POLICY

*** THREE THOUSAND *** Dollars
at the Home Office of the Company in the City and State of New York to

BENEFICIARY

Jora Lee, mother of the insured, Beneficiary Y.
(with *** the right on the part of the Insured to change the Beneficiary as hereinafter provided)
upon receipt at said Home Office of due proof of the death during the
continuance of this contract,

INSURED

of *** ARTHUR L. LEE *** the Insured.

This insurance is granted in consideration of the payment of the first premium

PREMIUM

of ** Sixty-four 2/100 ** Dollars

HOW AND
WHEN
PAYABLE

the receipt of which is hereby acknowledged, constituting payment for the period
terminating on the Sixth day of November
in the year Nineteen Hundred and sixteen and the payment of a like
sum on said date and on the Sixth day of
** November ** in every year
thereafter during the continuance of this Policy until the death of the Insured.

INCONTEST-
ABILITY

This Policy is free of conditions as to residence, travel, occupation, or
military or naval service, and shall be incontestable after one year from its
date of issue except for non-payment of premium. After its delivery to and
receipt by the Insured this Policy takes effect as of the Sixth
day of November Nineteen Hundred and fifteen

DATE POLICY
TAKES EFFECT

The benefits and provisions printed or written by the Company on the
following pages are a part of this contract as fully as if they were recited at
length over the signatures hereto affixed.

In Witness Whereof the NEW-YORK LIFE INSURANCE COMPANY
has caused this contract to be signed this Sixteenth day
of November Nineteen Hundred and fifteen

Examined

119

D.

O. L.

913-1

Raymond M. Ballard Secretary Samuel R. Kingoley President

Secretary

President

Register

AGE 24

INSURANCE PAYABLE AT DEATH. PREMIUMS PAYABLE DURING LIFE.
ANNUAL DIVIDEND.

Section 1—PARTICIPATION IN SURPLUS

The proportion of divisible surplus accruing upon this Policy shall be ascertained and distributed annually and will not be conditioned upon the payment of the premium. At the option of the Insured such dividend shall each year, on the anniversary of the Policy, be either

- (a) Paid in Cash; or,
- (b) Applied toward the payment of any premium or premiums; or,
- (c) Applied to the purchase of a participating Paid-up Addition to the sum insured; or,
- (d) Left to accumulate to the credit of the Policy at such rate of interest as the Company may declare on such funds, and payable on the maturity of the Policy or withdrawable in cash on any anniversary date of the insurance. The rate of interest shall not be less than three per centum compounded and credited annually.

If the Insured fails to notify the Company in writing, within three months after the Company shall have mailed to him a written notice of the amount of said dividend and the options available as aforesaid, which option he selects, the Company shall then apply said dividend to the purchase of a paid-up addition to the sum insured. Such paid-up addition may be surrendered for cash at any time, and the Cash Value thereof shall not be less than the original cash dividend.

Section 2—CASH LOANS AND BENEFITS ON SURRENDER OR LAPSE

CASH LOANS.—At any time after two full years' premiums have been paid, and while this Policy is in force, the Company shall advance to the Insured on the sole security of this Policy as duly evidenced in writing, any sum desired, the total indebtedness to the Company, including any advance then made, shall, however, not exceed that sum which with six per centum interest shall equal the Cash Surrender Value at the end of the then current insurance year. Interest on the loan shall be at the rate of six per centum per annum, payable annually on the premium paying anniversary date of the Policy. All or any part of the sum advanced may be repaid at any time. Failure to repay such advance or to pay interest thereon shall not avoid the Policy, but if the interest is not paid when due it shall be added to the indebtedness, and whenever the amount of the total indebtedness equals the Cash Surrender Value, the Policy shall become void one month after the Company shall have mailed notice of such fact to the last known address of the Insured and of the assignee of record, if any.

BENEFITS ON SURRENDER OR LAPSE. After two full annual premiums shall have been paid, the Insured may within three months after any default to payment of premium, but not later, surrender the Policy, and,

(a) Receive its Cash Surrender Value less any indebtedness to the Company hereon. The Cash Surrender Value shall be the reserve on this Policy, at the date of default (omitting fraction of a dollar per thousand of insurance) and the reserve on any Paid-up Additions thereto, and any dividends standing to the credit of this Policy, less a surrender charge which in no case shall be more than one and one-half per centum of the sum insured. After premiums have been paid for ten years or more there will be no surrender charge. The reserve will be computed according to the American Table of Mortality and interest at the rate of three per centum per annum; or,

(b) Receive non-participating Paid-up Insurance payable at the same time and on the same conditions as this Policy except as to Disability Benefits. The Insured may at any time obtain a loan on such Paid-up Insurance in accordance with the provisions contained in this Section, or surrender such Paid-up Insurance for its Cash Surrender Value.

(c) If the Policy be not surrendered for cash, or for Paid-up Insurance as above, the insurance shall be automatically continued for the face amount of this Policy plus any dividend additions and less any indebtedness to the Company hereon, from the date of default, for such term in years and months as is hereinafter provided, but without future participation and without the right to Loans or Cash Surrender Value and without Disability Benefits.

The amount of Paid-up Insurance, or the Term for which the insurance will be continued, shall be such as the Cash Surrender Value less any indebtedness to the Company hereon will purchase as a net single premium at the age of the Insured at the date of default, according to the American Table of Mortality and interest at the rate of three per centum per annum.

TABLE OF LOAN AND SURRENDER VALUES

The figures contained in this table represent the maximum amounts available, assuming that premiums have been paid in full for the number of years stated in the table, and that there is no indebtedness to the Company hereon and that there are no outstanding dividends.

AFTER POLICY HAS BEEN IN FORCE	CASH SURRENDER VALUE LOAN VALUE FOR EACH \$1,000 OF INSURANCE	PAID-UP LIFE INSURANCE FOR EACH \$1,000 OF INSURANCE	FACE AMOUNT OF THIS POLICY CONTINUED FOR	
			Yrs.	Mos.
2	\$8	\$22	1	0
3	21	56	2	8
4	28	75	3	8
5	36	93	4	7
6	43	113	5	8
7	56	143	7	4
8	68	172	9	0
9	81	201	10	9
10	95	230	12	5
11	106	253	13	8
12	117	275	14	10
13	129	298	15	10
14	141	320	16	9
15	154	342	17	6
16	167	364	18	2
17	180	385	18	8
18	194	407	19	2
19	207	428	19	5
20	222	448	19	8
21	236	469	19	10
22	251	490	20	0
23	267	509	20	0
24	282	529	20	0
25	298	548	19	11
Years				

Values for later years shall be computed upon the above basis, and will be furnished on request.

*The Loan Values in the above table are the maximum amounts available at the end of the policy year indicated. Loans may also be obtained during the policy year as set forth in this Section under "Cash Loans".

Ed. July, '10 O. L. 1,000. 24

Section 3—DISABILITY BENEFITS

A. Waiver of Premiums.—If, after this Policy shall have been in force one full year and before default in the payment of any premium, the Company receives due proof that the Insured before attaining the age of sixty years has become wholly disabled by bodily injury or disease so that he is and will be presumably, thereby permanently and continuously prevented from engaging in any occupation whatsoever for remuneration or profit, the Company shall waive payment of each premium as it thereafter becomes due during the Insured's said disability. In making any settlement under this Policy the Company shall not deduct any part of the premiums so waived, and the Loan and Cash Surrender Values provided for under Section 2 shall increase from year to year in the same manner as if the premiums so waived had been paid in cash. Under all the conditions aforesaid, except that the Insured shall have attained the age of sixty years before becoming disabled, the Company shall waive payment of each premium thereafter becoming due during such disability, but the face amount of the Policy shall be reduced by the amount of each such waived premium, and the Loan and Cash Surrender Values as provided for under Section 2 shall be based upon said reduced amount of insurance in the same manner as if the premiums for such reduced amount of insurance had been duly paid.

B. Instalment Payments.—In addition to waiving payment of premiums as aforesaid, if such disability shall have occurred before the Insured attained the age of sixty years, the Company, one year after said proof of such disability, shall pay to the Insured one-tenth of the face amount of the Policy and a like amount in each insurance year thereafter during the continuance of such disability prior to the maturity of the Policy; the Policy must be returned to the Company for the endorsement thereon of each payment. At the Insured's option any such payment or payments may be left with the Company to accumulate until the maturity of the Policy at such rate of interest as the Company may declare on funds so held by it but at a rate not less than three per centum, compounded annually. Each instalment shall reduce to that extent the

amount of insurance in force, and the Loan and Cash Surrender Values provided for under Section 2 shall be calculated for the reduced amount insured on the basis provided in said Section 2. If at the time when any such instalment becomes payable there shall be an indebtedness on the Policy in excess of the Cash Surrender Value of the reduced amount of insurance, the Company shall apply such part of the instalment as may be necessary to reduce the indebtedness to the amount secured by such Cash Surrender Value. Whenever the total amount of said instalments, together with the amount of any remaining indebtedness to the Company, shall equal the face amount of the Policy, plus any paid-up dividend additions, unpaid dividends and dividends left to accumulate to the credit of the Policy, then the Company's obligations under the Policy shall thereby be fully satisfied and discharged without further action.

C. Recovery from Disability.—Should the Company accept under this Policy proofs of disability, it may nevertheless at any time thereafter, and from time to time, but not oftener than once a year, demand of the Insured proof of the continuance of such disability, and upon failure to furnish such proof, or, if it appears that the Insured has become able to engage in any occupation whatsoever for remuneration or profit, no further premiums shall be waived and no further instalment payments will be made by the Company. But if the amount of the insurance shall then have been reduced under any of the foregoing provisions such reduced amount of insurance shall thereafter be the face amount of the Policy, and the premiums thereafter falling due will be reduced in proportion to the reduced amount of insurance, and all benefits under the Policy will be reduced accordingly.

Without prejudice to any other cause of disability, the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands above the wrists, or of both feet above the ankles, or of one entire hand and one entire foot shall be considered as total and permanent disability within the meaning of this Section.



Any indebtedness to the Company against this Policy may be covered by loan insurance, and, upon due proof of the death of the Insured, such loan insurance shall be applied to the cancellation of any such indebtedness. Loan insurance shall be subject to the following conditions:

First.—Evidence of insurability satisfactory to the Company shall be required. No loan insurance shall take effect until the Insured shall have received from the Company a certificate thereof.

Second.—Premiums must be paid in accordance with the rates in the following table. The premium for loan insurance shall be computed at the attained age of the Insured at the time when such loan insurance is made or renewed. For periods of less than one year, the premium shall be at the rate of one-tenth of the one year's premium for each month and fraction of a month.

Third.—Loan insurance shall not be granted for any period extending beyond the next premium paying anniversary date of this Policy, but may be renewed from year to year subject to evidence of insurability satisfactory to the Company and payment of premium at the attained age, but no loan insurance shall be granted or renewed after age sixty-five.

Fourth.—Whenever the loan insurance exceeds the indebtedness the Company may cancel that portion of the loan insurance in excess of the indebtedness, and refund the unearned premium.

Premiums for each \$100 of Loan Insurance.

Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year	Insured's Attained Age	Premium for One Year
15	\$0.73	34	\$0.85	53	\$1.57
16	0.74	35	0.87	54	1.61
17	0.74	36	0.87	55	1.79
18	0.74	37	0.89	56	1.81
19	0.75	38	0.90	57	2.00
20	0.75	39	0.92	58	2.21
21	0.76	40	0.94	59	2.48
22	0.76	41	0.96	60	2.82
23	0.77	42	0.99	61	3.20
24	0.77	43	1.01	62	3.61
25	0.78	44	1.04	63	4.06
26	0.78	45	1.07	64	4.56
27	0.79	46	1.11		
28	0.79	47	1.15		
29	0.80	48	1.20		
30	0.81	49	1.26		
31	0.83	50	1.33		
32	0.83	51	1.40		
33	0.84	52	1.48		

Section 5 OTHER BENEFITS AND PROVISIONS

AGE.—If the age of the Insured has been misstated the amount payable hereunder shall be such as the premium paid would have purchased at the correct age.

ASSIGNMENT.—Any assignment of this Policy must be made in duplicate and one copy filed with the Company at its Home Office. The Company assumes no responsibility as to the validity of any assignment.

CHANGE OF BENEFICIARY.—When the right of revocation has been reserved, or in case of the death of any beneficiary under either a revocable or irrevocable designation, the Insured, if there be no existing assignment of the Policy made as herein provided, may, while the Policy is in force, designate a new beneficiary, with or without reserving right of revocation, by filing written notice thereof at the Home Office of the Company accompanied by the Policy for suitable endorsement thereon. Such change shall take effect when endorsed on the Policy by the Company and not before. If any beneficiary shall die before the Insured, the interest of such beneficiary shall vest in the Insured.

GRACE.—A grace of one month (not less than thirty days) subject to an interest charge of five per centum per annum shall be allowed for the payment of every premium after the first, during which time the insurance shall continue in force. If death occurs within the period of grace the unpaid premium for the then current policy year shall be deducted from the amount payable hereunder.

PAID-UP AND ENDOWMENT OPTIONS.—Whenever the reserve on this Policy together with the reserve on existing dividend additions, if any, at the end of any policy year shall equal or exceed the net single premium for the attained age of the Insured by the American Experience Table of Mortality and interest at three per centum, for an amount or insurance equal to the face amount of this Policy, payable at the same time and under the same conditions as this Policy, the Company, at the written request of the Insured, will endorse the Policy as participating paid-up insurance for such amount as the said reserve will purchase when thus applied, any indebtedness to the Company to be a lien against said Paid-up Insurance upon the same terms and conditions as in Section 2; or, whenever said reserve at the end of any policy year shall equal or exceed the face amount of this Policy, the Company, upon surrender of the Policy and all claims thereunder, shall pay to the Insured the face amount of the Policy and any excess of said reserve, less any indebtedness to the Company.

PAYMENT OF PREMIUMS. All premiums are payable on or before the date due, at the Home Office of the Company or to an agent of the Company upon delivery of a receipt signed by the President, a Vice-President, a Second Vice-President, a Secretary or the Treasurer of the Company, and countersigned by said agent. The premium is always considered as payable annually, in advance, but by agreement in writing and not otherwise may be

made payable in semi-annual or quarterly payments. Any unpaid premiums required to complete the payments for the current policy year in which death occurs shall be deducted from the amount payable hereunder. The payment of a premium shall not maintain the Policy in force beyond the date when the next payment is due, except as herein provided.

PRIVILEGE OF CHANGE TO OTHER FORMS OF POLICIES

At any time, and while in full force, and provided the Insured is then less than sixty years of age, this Policy may be changed without medical re-examination for a Policy of the same amount, upon any form of insurance issued by the Company at the time this Policy takes effect and having a higher rate of premium but without Disability Benefits. Such change shall be effective upon payment of a sum equal to the difference between the premiums on the new Policy and the premiums paid on this Policy (exclusive of the premiums paid for Disability Benefits), with compound interest at the rate of six per centum per annum from the due date of each payment to the date when the change is made, and upon the surrender of this Policy. The new Policy shall take effect as of the date of this Policy, and the premium shall be based upon the same age as this Policy. The cash value of any dividends standing to the credit of this Policy, as well as any additional cash value of such dividends that would have been credited under the new Policy may be used in the settlement of the difference of premiums.

REINSTATEMENT

At any time after any default, upon written application by the Insured and upon presentation at the Home Office of evidence of insurability satisfactory to the Company, this Policy may be reinstated together with any indebtedness in accordance with the loan provisions of the Policy, upon payment of arrears of premiums with interest thereon at the rate of five per centum per annum.

SELF DESTRUCTION

In event of self-destruction during the first insurance year, whether the Insured be sane or insane, the insurance under this Policy shall be a sum equal to the premiums thereon which have been paid to and received by the Company, and no more.

MISCELLANEOUS PROVISIONS

The Policy and the application therefor constitute the entire contract between the parties. All statements made by the Insured shall, in absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this Policy or be used in defense to a claim hereunder unless it be contained in said written application, a copy of which was attached to this Policy when delivered. The Insured may, without the consent of the beneficiary, receive every benefit, exercise every right and enjoy every privilege conferred upon the Insured by this Policy. No agent is authorized to waive forfeitures, or to make, modify or discharge contracts, or to extend the time for paying a premium.

Section 6—INSTALMENT OPTIONS

If there is no assignment of this Policy, the Insured, or in case the Insured shall not have done so, the beneficiary after the Insured's death may, by written notice to the Company at its Home Office, make the proceeds of this Policy payable under one of the following options instead of in one sum, to wit:

Option 1.—The proceeds of the Policy or any part thereof, may be left with the Company subject to withdrawal in whole or in part at any time on demand in sums of not less than one hundred dollars. The Company shall pay interest on the proceeds so left with it at such rate as it may each year declare on such funds, at a rate, however, never less than three per centum per annum and credited annually.

Option 2.—In equal instalments for an agreed number of years, payable immediately upon approval of proofs of death of the Insured, and annually, semi-annually, quarterly, or monthly thereafter as may be agreed. The amount of each instalment shall be in accordance with the instalment table on the last page of this Policy. Unless otherwise agreed in writing, the Company, upon due demand, shall pay in one sum the value of all unpaid instalments commuted at three per centum compound interest.

Option 3.—In equal instalments for twenty years, and for as many years thereafter as the beneficiary shall survive, payable immediately upon approval of proofs of death of the Insured, and annually, semi-annually, quarterly, or monthly thereafter as may be agreed. The amount of each instalment shall be determined by the attained age, on the date of the approval of proofs of death of the Insured, of the beneficiary to whom it is payable and in accordance with the instalment table on the last page of this Policy. If the Insured shall so direct in writing, the instalments payable under this option shall not be transferable, nor subject to commutation or incumbrance, during the lifetime of the beneficiary entitled thereto.

If there be more than one beneficiary under the option selected, the proceeds so left with the Company, unless otherwise agreed in writing, shall be deemed to be divided into as many equal parts as there are beneficiaries, and shall be credited and paid to each beneficiary severally.

In the event of the death of a beneficiary any unpaid sum left with the Company under Option 1, or any unpaid instalments payable to him under Option 2, or any instalments for the fixed period of twenty years only under Option 3 which shall not then have been paid, shall be commuted at three per centum compound interest, and unless otherwise agreed in writing shall be paid in one sum to the executors or administrators of such beneficiary.

The sums payable under the foregoing options are based upon an assumed interest earning of three per centum, but if in any year the Company shall declare for that year upon funds held by it under such options a greater interest rate than three per centum, the sum then payable under Option 2, or under Option 3 within the fixed period of twenty years, shall be increased accordingly.

After approval of proofs of the death of the Insured, and upon surrender of the Policy, the Company shall make and deliver to each beneficiary a certificate evidencing his rights and benefits under the option selected.

Instalment options are not applicable to a Policy which is payable to a corporation or co-partnership nor to policies under which the net sum payable is less than one thousand dollars.

INSTALMENT TABLES.

Instalment payments under Options 2 and 3 specified in Section 6 on the third page of this Policy, may be made annually, semi-annually, quarterly or monthly; the minimum basis of such payments will be \$50 when paid annually, \$25 when paid semi-annually, \$15 when paid quarterly, or \$10 when paid monthly, and the total of the fractional payments each year shall equal the annual payment each year as shown in the following tables, which are based upon a Policy, the proceeds of which are \$1,000. The figures contained in the table will apply pro rata to this Policy.

OPTION 2.

Number of Annual Instalments.	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25
Amount of each Annual Instalment	\$67.39	\$43.23	\$31.19	\$21.99	\$17.22	\$15.81	\$14.30	\$12.69	\$11.81	\$10.92	\$9.53	\$9.29	\$8.94	\$8.32	\$7.29	\$7.74	\$7.59	\$7.78	\$7.85	\$7.98	\$8.04	\$7.12	\$5.25

OPTION 3.

Age of Beneficiary at death of Insured	0	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Amount of each Annual Instalment	\$42.46	\$40.17	\$39.38	\$39.06	\$38.93	\$38.91	\$38.90	\$39.05	\$39.19	\$39.35	\$39.52	\$39.70	\$39.88	\$40.08	\$40.28	\$40.49	\$40.71	\$40.94	\$41.18
Age of Beneficiary at death of Insured	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37
Amount of each Annual Instalment	\$41.42	\$41.68	\$41.95	\$42.24	\$42.53	\$42.84	\$43.16	\$43.49	\$43.84	\$44.20	\$44.56	\$44.95	\$45.39	\$45.82	\$46.27	\$46.73	\$47.22	\$47.73	\$48.25
Age of Beneficiary at death of Insured	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56
Amount of each Annual Instalment	\$48.79	\$49.36	\$49.94	\$50.54	\$51.17	\$51.80	\$52.45	\$53.12	\$53.80	\$54.49	\$55.19	\$55.89	\$56.60	\$57.29	\$57.98	\$58.66	\$59.32	\$59.96	\$60.58
Age of Beneficiary at death of Insured	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75
Amount of each Annual Instalment	\$61.16	\$61.72	\$62.23	\$62.71	\$63.15	\$63.54	\$63.89	\$64.20	\$64.45	\$64.67	\$64.85	\$64.98	\$65.09	\$65.16	\$65.21	\$65.21	\$65.21	\$65.25	\$65.25

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NOTE:—In change, designation, or destination shall also other until endorsed on this Policy by the Company or the Home Office.

REGISTER OF CHANGE OF BENEFICIARY

DATE ENDORSED	BENEFICIARY	ENDORSED BY
Apr. 15, 1917.	Wm. J. Lee, Jr.	
Jan. 23, 1918.	Wm. J. Lee, Jr.	
Feb. 23, 1918.	Wm. J. Lee, Jr.	
May 27, 1932	Reatha M. Shelley, friend.	
June 7, 1937	Isabelle Clark, friend, or in event of her death, the estate of her husband.	

NEW YORK LIFE INSURANCE COMPANY

ARTHUR L. LEE

No. 4 800 270

Amount \$ 3000

Annual Premium \$ 64.02

Notice: It is not necessary for the insured or the Beneficiary to employ the agency of any person, firm or corporation, in collecting the insurance under this Policy, or in receiving any of its benefits. Time and expense will be saved by writing direct to the Home Office, 346 and 348 Broadway, New York City.

ORDINARY LIFE. 010-1.

EXHIBIT

WILLIAM L. FROST



DEFENDANTS' EXHIBIT No. 5

New York Life Insurance Company
Oregon Branch Office
American Bank Bldg., 621 S.W. Morrison St.
Portland 5, Oregon

March 5, 1951.

File O.

Registered Mail.

Mr. Arthur L. Lee,
2241 N.W. Hoyt Street,
Portland, Oregon.

Policy No. 4 860 276.

Dear Mr. Lee:

Please find herewith your policy numbered above and the photostatic copy of the Decree No. 110,283.

The Home Office has instructed us to advise you that this Divorce Decree does not dispose of the policy and that under the circumstances we should advise you that no transaction under this policy will be permitted without the consent of Florence Lee, former wife or until such time as the Company is furnished with a release from her, releasing all her interest and claims in the policy.

We have also been instructed to inform you that a photostatic copy of this Decree has been retained in our files at the Home Office.

The policy has had no endorsement made on it.

Sincerely yours,

/s/ R. H. ORTH,

For Cashier.

DEFENDANTS' EXHIBIT No. 6

New York Life Insurance Company
Oregon Branch Office
American Bank Bldg., 621 S.W. Morrison St.
Portland 5, Oregon

December 18, 1952.

File K.

Mr. Arthur L. Lee,
2241 N.W. Hoyt St.,
Portland, Oregon.

Policy No. 4 860 276.

Dear Mr. Lee:

We quote below a letter just received from our Home Office:

"Our Office of General Counsel has advised that when you write to this insured you should inform him that we do not deny him his right under the policy to surrender it in accordance with its terms and conditions, but we will not be able to pay the cash surrender value to him alone without the consent of Florence Grusenmeyer, in view of her claim. With this consent Mrs. Grusenmeyer should furnish

us with a statement certifying that she and Florence Lee are one and the same person.

“Premiums for this policy are paid to November 6, 1952, and the cash value quoted below will be available until February 6, 1953, provided no further premiums are paid.

“If this cash value is desired while available, we will require the return of the policy and the attached request for cash value signed by the Insured and consented to by Florence Grusenmeyer with the agreement that it will be in order for us to surrender this policy for its cash value and issue our check to his order.

“Cash Value	\$1,512.00
“Surrender Allowance	72.00
“Divs. at Interest	108.30
“1952 Dividend	18.93

“Total Cash Calue.....\$1,711.23”

On receipt of the above requirements we will be pleased to refer them to our Home Office.

Yours sincerely,

/s/ W. P. KRUEGER,

For Cashier.

DEFENDANTS' EXHIBIT No. 7

New York Life Insurance Company
Portland Branch Office
American Bank Bldg., 621 S.W. Morrison St.
Portland 5, Ore.

Jan. 13, 1953.

Mr. Arthur L. Lee,
2241 N.W. Hoyt Street,
Portland, Oregon.

Policy No. 4 860 276.

Dear Mr. Lee:

Please refer to our letter of December 18th. We have not received a reply and we wish to call your attention to the second paragraph in which the Home Office advises that the cash value quoted would be available until February 6, 1953, providing no further premiums are paid.

We trust that you are giving this matter your attention so that the requirements called for may be furnished before that time.

Yours sincerely,

/s/ W. P. KRUEGER,
For Cashier.

DEFENDANTS' EXHIBIT No. 8

Portland Branch

New York Life Insurance Company
51 Madison Avenue, New York 10, N. Y.

Actuarial Department

June 5, 1953.

Mr. Arthur L. Lee,
2241 N.W. Hoyt Street,
Portland, Oregon.

Policy Number: 4 860 276.

Due date of premium in default: Nov. 6, 1952.

Temporary (or Extended Term) Insurance:

Amount: \$3,000.

Expiry Date: Aug. 25, 1971.

Dear Mr. Lee:

Default in payment of premium having occurred under the above-numbered policy, notice is hereby given that insurance has been continued automatically thereunder as Temporary (or Extended Term) Insurance as stated above, all subject to the terms and conditions of the policy.

The Company will be pleased to consider reinstatement of the policy upon receipt of proper requirements and suggests that you complete and return the attached stub.

Very truly yours,

/s/ WM. MAC FARLANE,

Vice-President and Chief
Actuary.

DEFENDANTS' EXHIBIT No. 9

Richard C. O'Connor
Attorney at Law
Inheritance Tax Appraiser
San Francisco 3, Cal.

October 28, 1953.

Messrs. Davis, Jensen & Martin,
Attorneys at Law,
United States National Bank Bldg.,
Portland 4, Oregon.

Attention: Donald W. McEwen.
Re: New York Life vs. Lee, et al.

Gentlemen:

Thank you for Mr. McEwen's letter of October 23, 1953. My client, however, is financially unable to appear or for me to appear for the pre-trial conference, or, indeed, for the trial itself. She is therefore prepared to await whatever judgment the Court sees fit to enter, feeling that the evidence which Mr. Lee presents will in itself establish the justice of her claim.

I am sending a copy of this to Mr. Bollenback and, of course, you are both free to reveal its contents to the Court.

Very truly yours,

RICHARD C. O'CONNOR.

RCO'C:HC.

cc: C. X. Bollenback.

DEFENDANTS' EXHIBIT No. 10

Civil Form 34.

No. 110-283

In the Superior Court of the State of California in
and for the County of Los Angeles

No. D 34430, Dept. 3

FLORENCE TRAVERS,

Plaintiff,

vs.

FRANK E. TRAVERS,

Defendant.

FINAL JUDGMENT OF DIVORCE

In this cause an interlocutory judgment was entered on the 3rd day of August, 1925, adjudging that plaintiff was entitled to a divorce from defendant, and more than one year having elapsed, and no appeal having been taken from said judgment, and no motion for a new trial having been made, and the action not having been dismissed;

Now, on motion of plaintiff, it is adjudged that plaintiff be and is granted a final judgment of divorce from defendant and that the bonds of matrimony between plaintiff and defendant be, and the same are, dissolved.

It is further ordered and decreed that wherein said interlocutory decree makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made

binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory decree relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto.

Done in open Court this 1st day of September, 1926.

ALBERT LEE STEPHENS,
Presiding Judge.

Entered in Book 618, Page 209.

No. 16424

Filed: Sept. 1, 1926.

Entered: Sept. 3, 1926.

State of Oregon,
County of Multnomah—ss.

I, Si Cohn, County Clerk and Ex Officio Clerk of the Circuit Court of the State of Oregon for the County of Multnomah, a Court of Record, Do Hereby Certify That the Foregoing Copy of Final Judgment of Divorce—Florence Travers, Plaintiff, vs. Frank E. Travers, Defendant. No. 110-283, D 34430, Has Been Compared by Me With the Original and That It Is a Correct Transcript Therefrom, and of the Whole of Such Original Final Judgment of Divorce as the Same Appears on File in My Office and in My Custody.

In Testimony Whereof, I have Hereunto Set My

Hand and Affixed the Seal of Said Court, This 28th
Day of Sept., A.D. 1954.

SI COHN,
County Clerk.

By /s/ B. STOKES,
Deputy.

In the United States District Court
for the District of Oregon

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint for interpleader; Answer of defendant, Arthur L. Lee; Answer of Florence Grusenmeyer; Pre-trial order on issue of interpleader; Memorandum of Judge Claude McColloch; Findings of fact and conclusions of law; Judgment; Notice of appeal; Undertaking for payment of costs on appeal; Designation of contents of record on appeal; Order to forward exhibits to Court of Appeals and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7070, in which New York Life Insurance Company, a corporation, is the plaintiff and appellant and Arthur L. Lee, Florence Grusenmeyer, formerly Florence Lee, and Isabel Clark are defendants and appellees; that the said

record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this court.

I further certify that the cost of filing the notice of appeal is \$5.00, and that the same has been paid by the appellant.

I further certify that there is also enclosed herewith Exhibits 1 to 3, inc., 3-A; 3-B; and 4 to 10, inc., together with Transcript of Proceedings of September 30, 1954.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 17th day of January, 1955.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14624. United States Court of Appeals for the Ninth Circuit. New York Life Insurance Company, a Corporation, Appellant, vs. Arthur L. Lee and Florence Grusenmeyer, Formerly Florence Lee, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 18, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14624

NEW YORK LIFE INSURANCE COMPANY,
Appellant,

vs.

ARTHUR L. LEE, FLORENCE GRUSEN-
MEYER, Formerly FLORENCE LEE, and
ISABEL CLARK,

Appellees.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Comes now the New York Life Insurance Com-
pany, appellant above named, and for a statement
of points on which it intends to rely on this appeal,
says:

1. The District Court erred in finding and hold-
ing that the action instituted by appellant in inter-
pleader could not be maintained.

2. The District Court erred in dismissing appel-
lant's action in interpleader.

3. The District Court erred in failing to find and
hold that there were two adverse claimants claiming

the funds deposited into the registry of the District Court by appellant.

4. The District Court erred in failing to make an order of interpleader requiring the defendants, Arthur L. Lee and Florence Grusenmeyer, to interplead their respective claims to the funds deposited in the registry of the District Court by appellant, and that plaintiff be discharged from all liability.

5. The District Court erred in finding and holding that the action in interpleader could not be maintained upon the ground that if the relief of interpleader was granted the defendant, Arthur L. Lee, would be deprived of attorneys' fees in an action pending in the Circuit Court of the State of Oregon for the County of Multnomah.

DAVIS, JENSEN &
MARTIN, and

DONALD W. McEWEN,

By /s/ DONALD W. McEWEN,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 21, 1955.

United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, Formerly Florence Lee,

Appellees.

APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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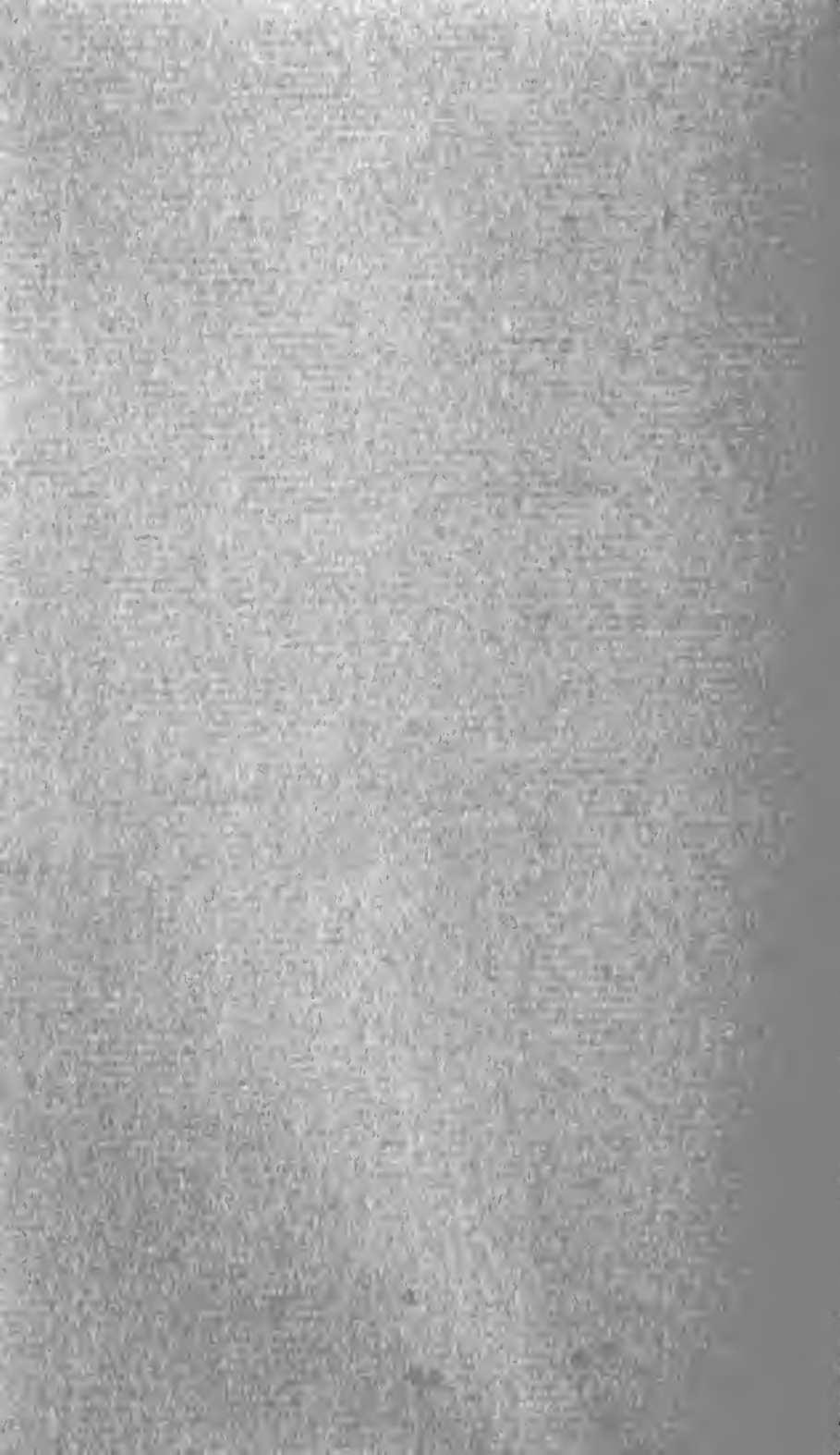
RICHARD C. O'CONNOR,
785 Market Street,
San Francisco, California,

Attorney for Appellee Florence Grusenmeyer.

FILED

MAR 25 1955

PAUL P. O'BRIEN, CLERK



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United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, Formerly Florence Lee,

Appellees.

APPELLANT'S BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JURISDICTIONAL STATEMENT

The New York Life Insurance Company, a corporation, organized and existing under and by virtue of the laws of the State of New York commenced this action of interpleader in the United States District Court for the District of Oregon. The action was commenced against Arthur L. Lee and Isabel Clark, citizens of the State of Oregon, and Florence Grusen-

meyer, formerly Florence Lee, a citizen of the State of California.

The interpleader was predicated upon a policy of life insurance issued by appellant upon the life of appellee, Arthur L. Lee. The complaint alleged that each of the defendants, Arthur L. Lee and Florence Grusenmeyer, claimed that he or she was the only person entitled to the proceeds of the policy and that the defendant, Isabel Clark, claimed some right, title and interest in the policy. Simultaneously with the commencement of the action appellant paid into the registry of the District Court the sum of \$1,711.25. The amount in controversy exceeds the sum of \$500.00.

Jurisdiction of the District Court existed by virtue of the amount in controversy and the diversity of citizenship between the appellee, Arthur L. Lee, and appellee, Florence Grusenmeyer, both of whom claimed the fund deposited in the Registry of the Court (Title 28, Sec 1332 (a) (1) and Sec 1335 (a) (1), United States Code).

Judgment was entered on November 15, 1954, dismissing the action and ordering the Clerk of the District Court to return to appellant the sum previously deposited in the Registry of the Court. Thereafter, on December 14, 1954, appellant filed notice of appeal from said judgment and final order.

This Court has jurisdiction by virtue of Sec 1291, Title 28, United States Code.

STATEMENT OF THE CASE

THE ISSUES

Appellant in its statement of points sets forth five issues which, for purposes of simplicity and clarity, are reduced to the following specifications of error.

1. The District Court erred in failing to find and hold that there was a valid basis for interpleader. (This specification covers point 1, R. 73.)

2. The District Court erred in dismissing appellant's action of interpleader and in failing to find that there were two adverse claimants to the fund and in failing to make an order requiring the adverse claimants to interplead their respective claims to the fund and ordering appellant discharged from all liability. (This specification covers points 2, 3 and 4, R. 73.)

3. The District Court erred in holding that interpleader could not be maintained upon the ground that if such relief were granted plaintiff, defendant, Arthur L. Lee, would be deprived of attorneys' fees in an action pending in a Court of the State of Oregon. (This specification covers point 5, R. 74.)

NARRATIVE STATEMENT

On November 16th, 1915, appellant issued its policy of ordinary life insurance, Number 4860276 (R. 59) to the appellee, Arthur L. Lee, insuring his life in the sum of \$3,000.00. The policy reserved to the insured the unqualified right to change the beneficiary. The

policy further provided that after two full annual premiums had been paid, the insured could within three months after any default in payment of premiums surrender the policy and receive its cash surrender value. The policy contained a table for the computation of the cash surrender value.

On or about the 31st day of July, 1926, the appellees, Arthur L. Lee and Florence Grusenmeyer, were married in the State of Nevada. Florence Grusenmeyer had previously been married to a Frank E. Travers, and an interlocutory decree of divorce had been granted to her in a suit brought by her against him on July 27, 1925. A final decree of divorce in that suit was granted on September 1, 1926, and entered of record on September 3, 1926 (R. 69). During the period, September 22, 1926, to May 27, 1932, Florence Grusenmeyer was the designated beneficiary of the policy. For some time after the 31st day of July, 1926, the defendants, Arthur L. Lee and Florence Grusenmeyer, then known as Florence Lee, lived together as husband and wife in the State of California (R. 21).

Some time thereafter Arthur L. Lee commenced a suit in a Circuit Court of the State of Oregon seeking an annulment of the marriage. Florence Grusenmeyer was not personally served with summons and complaint, and service upon her was had by publication. On January 25, 1934, a decree was entered in that suit declaring the marriage null and void from the beginning. This decree did not determine any property rights between the parties (R. 22).

On December 1, 1952, the policy of insurance had a cash surrender value of \$1,711.25 (R. 23), and on or about December, 1952, appellee, Arthur L. Lee, demanded the cash surrender value from the appellant. Prior to that time appellee, Florence Grusenmeyer, had advised appellant that she claimed an interest in the policy (R. 54). Appellant advised appellee, Arthur L. Lee, that it could not pay the cash surrender value to him unless Florence Grusenmeyer consented thereto. The insured made no further payment of premiums, and in due course the appellant notified the insured that the policy, in accordance with its terms, had been converted to extended insurance, which had no cash value.

On May 4, 1953, Appellant, Arthur L. Lee, commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah seeking the recovery of the cash surrender value with interest and attorneys' fees (R. 24). On July 14, 1953, appellant commenced this action of interpleader in the United States District Court for the District of Oregon, naming as defendants, Arthur L. Lee, the insured, Florence Grusenmeyer, and Isabel Clark, the one named as beneficiary at the time the insured demanded the cash surrender value.

Florence Grusenmeyer appeared in the interpleader, consented to the allowance of interpleader and claimed an interest in the cash surrender value (R. 16). The insured, Arthur L. Lee, appeared and denied that it was a proper case for interpleader (R. 8). Isabel Clark

did not appear, and an order of default was entered against her. The action progressed to a pre-trial conference, and the Court ordered the parties to proceed with the pre-trial conference upon the segregated issue for the purpose of determining if the suit for interpleader may be maintained. After a trial on that issue the aforementioned judgment and order (R. 41) were entered, and this appeal followed.

SPECIFICATIONS OF ERROR

1. The District Court erred in failing to find and hold that there was a valid basis for interpleader. (This specification covers point 1, R. 73.)

2. The District Court erred in dismissing appellant's action of interpleader and in failing to find that there were two adverse claimants to the fund and in failing to make an order requiring the adverse claimants to interplead their respective claims to the fund and ordering appellant discharged from all liability. (This specification covers points 2, 3 and 4, R. 73.)

3. The District Court erred in holding that interpleader could not be maintained upon the ground that if such relief were granted plaintiff, defendant, Arthur L. Lee, would be deprived of attorneys' fees in an action pending in a Court of the State of Oregon. (This specification covers point 5, R. 74.)

ARGUMENT

A Valid Basis for Interpleader Exists

The statute giving the United States District Courts original jurisdiction of actions of interpleader or in the nature of interpleader sets forth three basic requirements which must be met in order to maintain the action. These requirements are:

1. The amount in controversy must equal \$500.00 or more.

2. Two or more adverse claimants of diverse citizenship are claiming or may claim to be entitled to the money or property or claiming one or more of the benefits arising by virtue of any note, bond, certificate, policy, instrument or by virtue of any obligation.

3. The plaintiff in interpleader has deposited the money or property into the registry of the Court to abide the judgment or has been given an appropriate bond conditional upon compliance by plaintiff with the future order or judgment of the Court (Title 28, United States Code, Sec 1335).

Appellant, simultaneously with the commencement of this action, paid into the registry of the District Court the cash surrender value of the policy, being the sum of \$1,711.25. This fact alone establishes that requirements one and three, set forth above, have been met.

The only remaining requirement is whether there were two or more claimants of diverse citizenship. The

diversity of citizenship between appellees, Lee and Grusenmeyer, is established (R. 18).

Prior to the institution of any litigation concerning the life insurance policy, appellee, Florence Grusenmeyer, had by notice in writing informed appellant that she claimed some interest in the policy (R. 54). At the time the insured made demand for the cash surrender value, appellant was on notice that Grusenmeyer claimed an interest in the policy. Thus at the time the action was commenced the appellant was faced with two conflicting claims to the benefits arising from the policy.

Counsel for the appellee, Lee, submitted to the Court a proposed finding of fact that Florence Grusenmeyer had no interest in the proceeds of the policy, and that appellant knew that any claim asserted by her was sham and frivolous at the time the interpleader was commenced. This finding the trial Court refused to make (R. 39).

The State Court could not have obtained jurisdiction of Florence Grusenmeyer in the action commenced by appellee Lee against appellant in the Oregon State Court and the State could well have dismissed the action on the grounds that it did not have jurisdiction to render a decision binding upon all the necessary parties.

There being two adverse claimants of diverse citizenship, both claiming the fund deposited in the registry of the Court, the interpleader was clearly maintainable.

In *Metropolitan Life Insurance Company vs. Mason et al*, 98F2d 668 (3rd Cir.) the insured brought action to recover the cash surrender value of two policies issued by the insurer in a municipal Court of Philadelphia. Thereafter, one, Nance Mason, notified the insurer that he was the owner of the policies and that the insured took the policies from him without permission. He requested the insurer to make no payments to the insured. Faced with these conflicting claims, the insurer filed an action of interpleader in the U. S. District Court. The trial Court dismissed the action on the ground that the claimants were not claiming the same thing; one defendant claimed a benefit under the policy and the other the right of possession of the policy (*Metropolitan Life Insurance Company vs. Mason*, 21F Supp 704). The Court of Appeals reversed the District Court, pointing out that both defendants claimed ownership of the policies, and that ownership of the policies was the issue to be decided and that such decision should be made in the interpleader action. The Court held that the purpose of the interpleader statute was to afford two-fold broad equitable relief, First, to relieve a disinterested stakeholder from present litigation, and Secondly, to forestall future litigation by adjudicating all claims in one suit.

The facts of the *Mason* case are in some respects analogous to the facts in the instant case. There the insured instituted an action to recover the cash surrender value in a local court. After that action was commenced, a non-resident third party notified the

insurer that he claimed some interest in the policy. The insurer confronted with these conflicting claims filed an action of interpleader in a District Court of the United States just as appellant did in the instant case. In both cases the only action available to settle all questions in a single adjudication was an action of interpleader under the Federal Interpleader Statute because the claimants being of diverse citizenship, only the Federal Court would obtain jurisdiction over all claimants. The Mason case properly gives a liberal construction to the Federal Interpleader Statute. That such construction is proper, see *Hartford Fire Insurance Company vs. Sanders* 38F 2d 212.

The Circuit Court of Appeals, Eighth Circuit, has adequately expressed the rule regarding when an action of interpleader may be maintained. In *Hunter vs. Federal Life Insurance Co.* 111F 2d 551, in an opinion by Judge Sanborn the Court stated: "The jurisdiction of a Federal Court to entertain an action of interpleader is not dependent upon the merits of the claims of the various claimants." (See also *Metropolitan Life Insurance Company vs. Segartis* 20F Supp 739.) "It is our opinion that a stakeholder, acting in good faith, may maintain a suit in interpleader for the purpose of ridding himself of the vexation and expense of resisting adverse claims even though he believes that only one of them is meritorious."

Appellant commenced this action of interpleader to secure in a single controversy an adjudication binding on all the parties, and to relieve itself of the neces-

sity of defending two or more suits concerning the same subject matter. Prior to the commencement of the interpleader, appellant was on notice that there were two adverse claimants. Appellant was also on notice that these adverse claimants had entered into a marriage ceremony and had lived as husband and wife for a number of years in a community property state. Having knowledge of these facts and confronted with two adverse claims, appellant commenced this action of interpleader. This was the only course by which appellant could in a single controversy obtain an adjudication binding on all of the claimants.

There Are Two Adverse Claimants to the Fund Deposited in the Registry of the Court

Appellee, Lee, the insured in the policy, obviously had an interest in the fund. If the appellee, Grusenmeyer, had some realistic promise upon which to base her claim, then the existence of adverse claimants is established. That she actually did claim an interest is established beyond dispute. She twice communicated with appellant in writing, each time claiming some interest in the policy (R. 54-55). After service of summons and complaint in the interpleader action, she appeared and answered, claiming the entire fund deposited in the registry of the Court (R. 16).

The Findings of Fact made by the trial Court includes a finding that the appellees, after joining in a marriage ceremony, resided for some time in a community property state (California) (R. 21).

While so residing, the insured continued to pay the premiums on the policy here in issue. These payments were made with funds presumably community property. 11 Am Jur Community Property Sec 41, Re Ppper 158 Cal 619. The earnings of either spouse during marriage are presumed to be community property, 11 Am Jur Community Property Sec 34, Odone vs. Marzocchi 34 Cal 2d 431, 211 P2d 297, 17 ALR 2d 1104 rehearing denied 212 P2d 233. The effect of these presumptions establishes that premiums during this period were paid with community property.

Having established that a portion of the premiums on the instant policy were paid with community funds in California, the next logical issue to determine is what rights did such payment create in the members of the community. The California decisions establish that payment of premiums on a life insurance policy with community property makes the chose in action represented by the policy community property. The leading California case on the subject is New York Life Insurance Company vs. Bank of Italy 60 Cal App 602, 214 Pac 61. In the Bank of Italy case the premiums paid on the policy were paid entirely with community funds, and it was held to be community property. The Bank of Italy case is the subject of comment in 114 ALR at Page 546, and it has been consistently followed in subsequent decisions of the California Courts, Dixon Lumber Co. vs. Peacock 217 Cal 415, 19 P2d 233, Travelers Insurance Co. vs. Fancher 219 Cal 351, 26 P2d 482 and McBride vs. McBride 11 Cal App 2d 521, 54 P2d 480.

If the policy of life insurance is issued prior to the marriage of the parties and premiums after marriage are paid with community funds, the portion of the proceeds representing the proportion of the total amount of premium paid with community funds constitutes community property, and the balance is separate property of the husband. *Modern Woodman of America vs. Gray* 113 Cal App 729, 299 P 754. Upon death of the insured, where the policy names someone other than the spouse as beneficiary and all the premiums are paid with community funds, then the proceeds are divided equally between the beneficiary and the surviving spouse. If only a portion of the premiums are paid with community funds, then the portion of the proceeds corresponding to the total amount of premiums which was paid with community funds would be considered community property.

The rights of the parties to a California community are just as fixed if the marriage is terminated by divorce or other judicial separation as they are when the marriage is terminated by death.

In *Gefland vs. Gefland* 29 P2d 271 the facts were somewhat analogous to those in the case at bar. The parties were married and accumulated considerable property in the State of Maryland. Thereafter they acquired a domicile in the State of California. Included in the property acquired before moving to California were certain life insurance policies payable to named beneficiaries other than the wife. While the parties were domiciled in California, premiums on these poli-

cies were paid out of community funds. The wife brought suit for divorce and an award of community property. The trial Court made a finding that the parties had no community property and made no award to the wife. From this portion of the decree the wife appealed. In the District Court of Appeals the Court held that, while the wife upon divorce no longer had any insurable interest in the life of her former husband, she had a right to claim her interest in any property which was used to pay premiums. The Court held that, where the husband used community funds to pay premiums on life insurance of which the wife was not the beneficiary, the community was entitled to be reimbursed. The Court reversed that portion of the decree appealed from holding that the Court below should order the husband to make reimbursement out of his separate funds to prevent the community rights of the wife from being impaired. In the instant case the husband designated someone other than the wife beneficiary prior to the termination of the marriage (R. 37-62).

In the annulment suit brought by appellee, Lee, against the appellee, Grusenmeyer, no adjudication of any property rights was sought or made. (R. 36 Findings of Fact XIV.) The decree annulling the marriage of the parties has no effect on the community property rights of the parties existing at the time and is no bar to the present assertion of property rights in this action by appellee, Grusenmeyer. *Tarien vs. Katz* 216 Cal 554, 15 P2d 493. No property rights having been adjudicated in the proceeding terminating the mar-

riage, such rights may be litigated in a subsequent proceeding. *Tarien vs. Katz supra*, *Taylor vs. Taylor* 192 Cal 71, 218 P 756, 51 ALR 1074, *Coats vs. Coats* 160 Cal 671, 118 P 441. See further 11 Am Jur Community Property Sec 76 and 3 Cal Jur. Ten year Supp p 673.

From the evidence introduced in the Court below it was established that the appellee, Grusenmeyer, lacked capacity to contract a valid marriage at the time she and appellee, Lee, entered into the marriage ceremony (R. 35). This lack of capacity was occasioned by the fact that only an interlocutory decree of divorce had been entered in the suit brought to terminate her previous marriage (R. 69). A final decree was not entered until after the marriage of the appellees. The California decisions are uniform in holding that such lack of capacity does not deprive a defacto spouse of her rights in property acquired during the existence of the putative marriage.

In the early California case of *Coats vs. Coats* 160 Cal 671, 118 P 441, rehearing denied 118 P 445, the facts were these: The wife at the time she entered into the marriage was physically incapable of entering into marriage. Subsequently an annulment of the marriage was decreed as a result of a suit brought by the husband. No property rights were adjudicated in the annulment proceeding. From the date of the marriage ceremony to the annulment considerable property was accumulated by the parties. The services rendered by the wife in accumulation of this property were of no

pecuniary value. After the entrance of the decree of annulment the wife brought this action for a division of the properties accumulated by the parties during the period of time the marriage relationship existed. The trial Court awarded a sum of money to the wife, and an appeal followed.

The appellate Court affirmed the Court below, pointing out that until the making of the annulment decree the marriage was valid, and the property in issue was impressed with a community character. The Court stated that upon annulment such property, even though it is no longer community property, should be divided as community property upon death or divorce. The Coats case announces the rule that a person under some disability when entering into a marriage in good faith shall have the same rights in property accumulated during the existence of the marriage as he or she would have if the disability had not existed.

This decision has been consistently followed by the California Courts. These supporting decisions are all set out in 31 ALR 2d at p 1260. The more recent decision adhering to the rule is *Union Bank & Trust Co. et al. vs. Gordon* (1953) 116 Cal App 2d 681, 254 P2d 644. In the Gordon case the husband lacked capacity to contract a second marriage because a foreign divorce decree purporting to terminate his first marriage was void. Considerable property was accumulated by the husband and the alleged second wife during the time the relationship existed. Upon death of the husband the administrator brought an action to quiet title to

various parcels of real property and named both the first and second wife as defendants. They both appeared and claimed to be the sole owner of the property. The first wife asserted the lack of capacity of the husband to contract this second marriage as a bar to the second wife acquiring any interest in property accumulated during the existence of the relationship. The Court rejected the claim of the first wife and awarded all of the property in issue to the second wife. The rule announced in the early case of *Coats vs. Coats* was restated in the *Gordan* case in the following language, page 649: "On dissolution of a putative marriage property which the defacto spouse have acquired as a result of their joint efforts is to be treated as accumulation of a valid marriage." In California if a marriage is contracted in good faith and one of the contracting parties lacks capacity to contract the marriage upon annulment of that marriage the party lacking capacity is entitled to the same division of the property as he or she would have been entitled to in community property had the marriage not been subject to annulment but had been terminated by death or divorce.

While the record is silent as to the intentions of the appellees at the time they contracted the marriage, the law presumes they acted in good faith and in compliance with the law. The lack of capacity of appellee, Grusenmeyer, was occasioned by the fact that a final decree of divorce had not been entered terminating her previous marriage, and he relied on an interlocutory decree. That was the factual situation in *In Re Krone's Estate*, 83 Cal App 766, 189 P2d 741. There the wife

contracted marriage with Krone's shortly after an interlocutory decree had been entered and some ten months before a final decree of divorce was entered. The Court followed the rule previously annunciated herein and awarded all of the property to the defacto spouse and denied relief to children of the decedent by a previous marriage.

In the instant case the claim of the appellee, Gruenmeyer, is strengthened by the fact that payment of premiums of the policy in issue were made with funds presumably community in character. However, appellant's right to maintain the action of interpleader is not dependent upon the merits of the adverse claims. (See Metropolitan Life Ins. Co. vs. Segartis *supra*.)

Here a former defacto wife of the insured asserted a claim adverse to that of the insured and claimed an interest in the policy and claimed the funds paid into the registry of the Court. At the time the action of interpleader was commenced appellant was faced with two conflicting claims to all or part of the benefits accruing under its policy of insurance. It in good faith paid the money into the registry of the District Court in order that the respective claimants might interplead their claims to the fund on deposit. It could not without the risk of additional liability and the vexation of further litigation. So situated, appellant should have been afforded the relief contemplated by the federal interpleader statute.

Argument on the Issue of Attorneys' Fees

It is apparent from the Court's Memorandum dated November 1, 1954, (R. 31) and from the findings of facts (R. 40) that the Court below in denying appellant the relief of interpleader, did so because it felt that if it allowed the interpleader, the insured would be denied the right to recover attorneys' fees under Oregon Revised Statutes 736.325. This statute has been before the Oregon Supreme Court many times and has been held to be compensatory rather than penal. *Hagby vs. Mass. Bonding and Insurance Company* 169 Ore 132, 126 P2d 836. The purpose of the statute is not to postpone litigation but to require the insurer to pay reasonable attorneys' fees to the insured for unnecessary and wrongful delay, *M. Murray vs. Fireman's Insurance Company* 121 Ore 165, 254 P 817. The Oregon Supreme Court has stated that the object of the statute is to discourage lengthy and expensive litigation and that the statute should be considered as though it were a part of the insurance contract, *Dolan vs. Continental Casualty Co.* 133 Ore 252, 289 P 1057; *Title & Trust Co. vs. U. S. Fidelity and Guaranty Company* 138 Ore 467, 1 P2d 1100, 7 P2d 805. It is obvious from the foregoing cases that the object of the Oregon statute relating to the recovery of attorneys' fees in actions on insurance policies is to encourage prompt settlement of claims without litigation wherever possible. That the insurer can not make such settlement where it is faced with conflicting and adverse claims to the policy or some of the benefits thereunder is so apparent as to need no cita-

tion of authority. Here the appellant was faced with conflicting claims and could not make a prompt, immediate settlement with the insured. Appellant, being on notice of the conflicting claims, informed the insured that it would honor his request for the cash surrender value if he would obtain the consent of Florence Grusenmeyer thereto and surrender the policy. Such a suggestion afforded the conflicting claimants an opportunity to settle the dispute among themselves and offered one means of resolving the controversy without the expense and delay of litigation.

Thereafter upon being faced with litigation in the Oregon State Court, instituted by one of the conflicting claimants, to which litigation the other claimant could not be made a party, appellant commenced this action of interpleader. As previously stated, this was the only means available to appellant to obtain in a single controversy an adjudication binding on all adverse claimants. If it is a proper case for interpleader, then there can be no issue as to the insured's right to attorneys' fees.

CONCLUSION

It is respectfully submitted that there was a valid basis for interpleader, and appellant's action for interpleader should have been allowed, and the judgment of the District Court should be reversed and appellant granted the relief prayed for in its complaint for interpleader.

Respectfully submitted,

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AND ROBERTSON,

By ROLAND DAVIS,
THEODORE B. JENSEN,
Attorneys for Appellant.



United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,
Appellant,
vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, formerly Florence Lee,
Appellees.

BRIEF OF APPELLEE, ARTHUR L. LEE

*Appeal from the United States District Court for the
District of Oregon*

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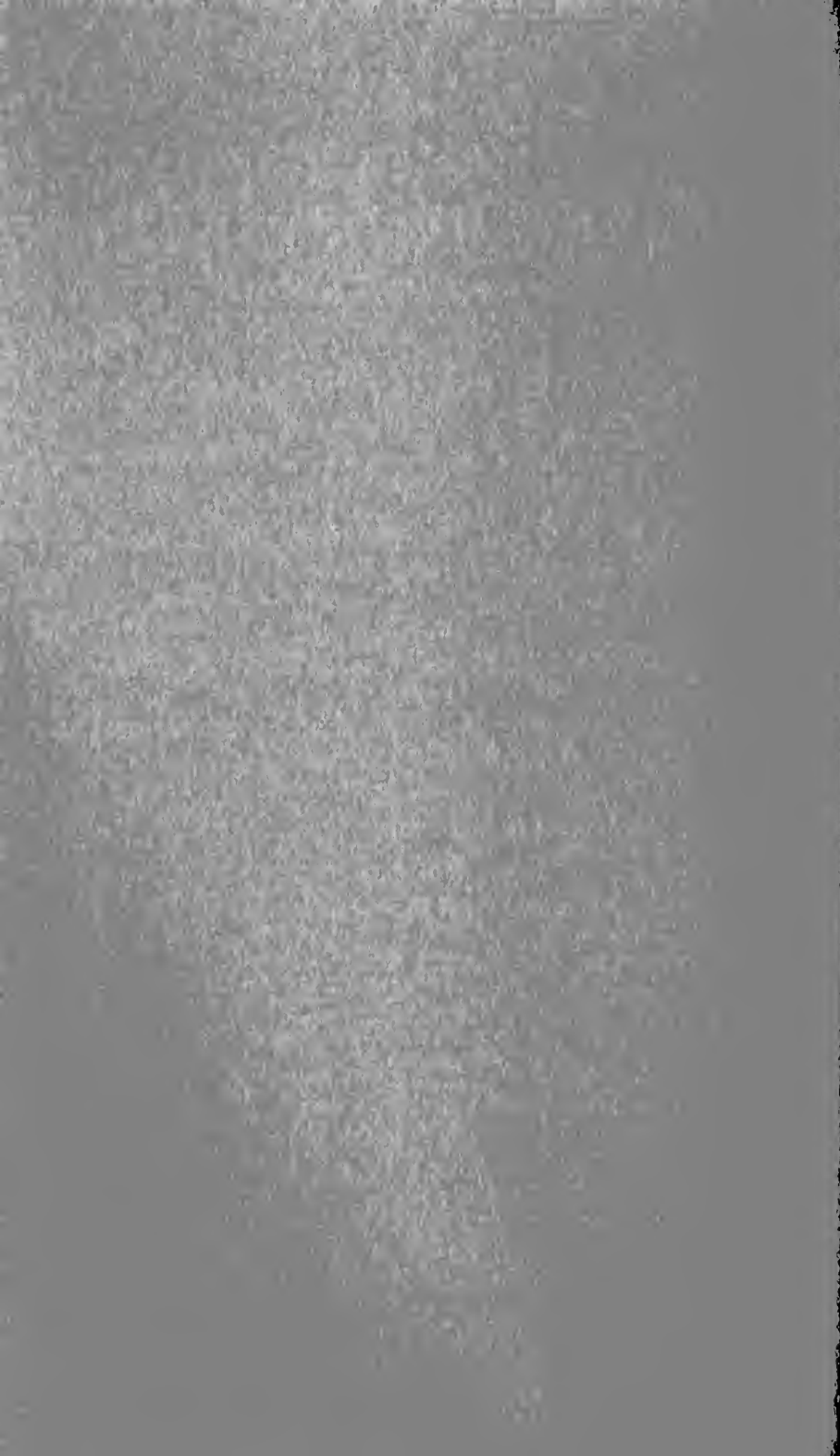
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United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, formerly Florence Lee,

Appellees.

BRIEF OF APPELLEE, ARTHUR L. LEE

*Appeal from the United States District Court for the
District of Oregon*

STATEMENT OF THE CASE

Narrative Statement

The appellee, Lee, believes the narrative statement contained in appellant's brief (pp. 3-6) to be deficient since certain facts are omitted from this statement.

The controlling facts, none of which are disputed, are these:

Nov. 16, 1915: Appellant issued to appellee, Arthur L. Lee, its policy No. 4860276, in the face amount of

\$3,000; this policy provided that appellee Lee had the unqualified right to change the beneficiary (Ex. 4, R. 59-62);

July 31, 1926: Appellee Lee went through a marriage ceremony with the present Florence Grusenmeyer. This marriage was not valid, through the lack of capacity on the part of Florence Grusenmeyer to enter into the contract of marriage (R. 34-5, Findings VII, VIII and X);

July 31, 1926: At the time of the purported marriage, this policy had a net cash value of \$208.23, being subject to a loan of \$100.00 (R. 35, Finding IX);

The parties lived in California, where community property laws exist, a portion of the time during the continuance of the purported marriage (R. 35, Finding VIII);

Sept. 26, 1926: The present Florence Grusenmeyer, then known as Florence Lee, was made beneficiary of policy (R. 35, Finding XI, also R. 62);

May 27, 1932: Appellant changed beneficiary of policy to Reetha M. Shelley, at request of appellee Lee (R. 21-22, Finding XII, also R. 62);

Dec. 21, 1932: Claim of present Florence Grusenmeyer made to appellant (R. 54). This claim is very broad in scope and included a demand that no change of beneficiary of policy be allowed.

Jan. 25, 1934: A decree based upon service by publication was entered in a suit by appellee Lee against the present Florence Grusenmeyer, in the Circuit Court of the State of Oregon, for the County of Multnomah,

declaring the purported marriage void ab initio. No property rights between the parties were determined (R. 22, Finding XIV);

Jan. 25, 1934: At the time of the annulment of the purported marriage, the policy had a net cash value of \$35.99, being subject to a loan in the amount of \$550.00 (R. 22, Finding XV);

June 7, 1937: Beneficiary of policy changed by appellant at request of appellee Lee, to Isabel Clark (R. 22-23, Finding XVI, also R. 62);

Dec. 1, 1952: Appellee Lee made demand upon appellant for the cash value of the policy which amounted at that time to the sum of \$1,711.25. This cash value was refused because Florence Grusenmeyer did not join in the request (R. 37, Findings XVII and XVIII). No further premiums were paid (R. 37-38, Findings XX and XXI);

That the appellant was furnished with certified copies of all decrees determining the marital status of Arthur Lee and the present Florence Grusenmeyer (R. 23, Finding XIX);

Dec. 18, 1952: Appellant asserted to appellee Lee that the cash value would only be available until February 6, 1953, and then only if Florence Grusenmeyer joined in the application (R. 64-5, 6, Ex. 6 and 7);

May 1, 1953: Action commenced by appellee Lee against appellant in the Circuit Court of the State of Oregon for the County of Multnomah, for the cash value of \$1,711.25, together with interest at the rate of

6% per annum from Dec. 18, 1952, together with \$1,-750.00 as reasonable attorneys' fees and his costs and disbursements (R. 38, Finding XXII);

June 5, 1953: Appellant asserted to appellee Lee that Policy had been converted into Temporary (or Extended Term) Insurance (R. 67, Ex. 8) which had no cash value (R. 38, Finding XXII);

July 14, 1953: Appellant filed this suit against appellee Lee, Florence Grusenmeyer and Isabel Clark, and paid the sum of \$1,711.25 into the registry of the Court. No supplemental bond was filed to cover any additional liability of appellant as claimed by appellee Lee.

STATUTES INVOLVED

The Federal Interpleader statute (28 USCA 1335) provides:

“(A) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of \$500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the value of \$500 or more, if

“(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plain-

tiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

“(B) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.”

SUMMARY OF ARGUMENT

The action of the trial court in dismissing the complaint was proper because:

No Valid Basis for Interpleader Exists

1. Appellant did not meet the requirements of a strict or pure bill of interpleader in that it was not a neutral stakeholder at the time of the commencement of the litigation by appellee Lee in the courts of the State of Oregon, since at that time it asserted that the cash value of the policy had been lost, and is not now neutral as to the appellee Lee's claim in excess of the cash surrender value.

2. Appellant did not meet the requirements of a bill in the nature of an interpleader, or so-called statutory interpleader, because it did not tender into court, or se-

cure the payment of the claim of the appellee Lee (which is greater than the amount tendered because of costs, interest and attorneys' fees demanded in the state court litigation), by filing a bond as provided by 28 USCA 1335 in the event that such additional claim were allowed upon final adjudication thereof.

No Colorable Adverse Claims Exists in Favor of Appellee Grusenmeyer

The purported claim of the appellee Grusenmeyer is sham and frivolous, and must have been known to be such by appellant because the net cash value of the policy at the time of the annulment of the purported marriage was less than at its inception; that under the laws of California, a wife would have no rights in such a policy, as such, but would have a right against the separate property of the husband for the extent to which community property was used to increase the value of the policy; that there was no such increase of net value during the existence of the alleged community in this case.

Attorneys' Fees Properly Considered by Trial Court

Allowance of this interpleader would have deprived the appellee Lee of his rights under Oregon statutes to costs, interest and attorneys' fees which were incurred by reason of appellant's repudiation of its liability under the policy, and which were demanded by Lee in his action commenced in the courts of the State of Oregon prior to the commencement of this action.

ARGUMENT

No Valid Basis for Interpleader Exists

The facts in the instant case are not such as to allow a strict or pure interpleader:

1. There are not two bona fide adverse claimants, which point will be covered more completely later.

2. Appellant did not stand neutral prior to commencement of the state court litigation by appellee Lee, since it asserted that the cash surrender value of the policy would be lost, and it persisted in this claim subsequent to the filing of this litigation in asserting that this cash value had been lost.

No right exists to a bill in the nature of interpleader because appellant did not pay into court the amount of the claim of appellee Lee, namely, the cash value, plus interest, costs and attorneys' fees, and posted no bond to comply with Sec. 1335, Title 28, USCA.

In the case of a strict or pure interpleader, one of the essential elements is that the stakeholder stand entirely neutral as to the claims of all parties.

The case of *Federal Life Ins. Co. v. Looney*, 180 Ill. App. 488 at 496, is an example of the cases so holding; in this case, the court said:

" . . . The amount due cannot be the subject of controversy in an interpleader suit and the difference between the amount claimed and the sum which plaintiff admitted and paid into court presents an insuperable objection to the prosecution of this suit as an interpleader (citing authorities). . . ."

In *Connecticut General Life Ins. Co. etc. v. Yaw* (DC WD NY 1931), 53 F. 2d 684, the court said, at page 686:

“ . . . It has been said to be an undeviating rule that claimant shall raise no question as to the amount of the claim. . . .”

Other authorities holding to the same effect are:

Heinemann v. Heinemann (CCA 6th Cir. 1931),
50 F. 2d 696.

Hooper v. Carlson, 134 Or. 241 at 245, 293 Pac.
410.

Annotation 108 A.L.R. 267.

48 C.J.S., Interpleader, Sec. 16c, p. 60.

In the case of a bill in the nature of interpleader, or so-called statutory interpleader, the stakeholder need not stand entirely neutral as to all the claims of all of the parties. In such a case, however, the plaintiff is not released upon payment into court of the sum it admits to be due, but is held in court until all claims are adjudicated.

In the case of *U. S. v. Sentinel Fire Ins. Co.* (CA 5th Cir. 1949), 178 F. 2d 217, two claimants asserted claims against the stakeholder in excess of the amount admitted by it to be due. They had commenced litigation in the state courts and when they filed their answer, they reiterated their claim for the additional amount. The court said (p. 223):

“Since the assignees had claimed \$17,000.00 rather than the amount of the loss, the insurance companies were not dismissed upon holding by the Court below that it was an appropriate case for interpleader. They were required to stay in the case and introduce the testimony on final hearing

of the insurance adjuster as to the damage caused to the property by the fire. Under these facts we cannot properly call this a case of pure interpleader. It seems to be merely a statutory interpleader wherein the plaintiff need not stand neutral as to all the claims of all the parties. . . ."

In *John Hancock Mutual Life Ins. Co. v. Kegan*, 22 Fed. Supp. 326, there were two claimants, one demanding \$13,000 and the other \$30,000. The insurance company admitted its liability for the sum of \$13,035 and executed a bond agreeing to pay \$30,000 if it were held liable therefor.

The court said, at p. 331:

"The plaintiff admits its liability for the sum of \$13,035 and on the averments of the bill this amount is claimed by each of the defendants, one of whom has brought suit to recover it (as a part of her whole claim of \$30,000), and the other defendant has threatened suit therefor. Therefore with respect to the sum of \$13,035 the case presents the simple aspect of a strict bill of interpleader and to the extent of the amount so admitted by the plaintiff to be due there seems to be no reason for denying to it relief from double vexation even though as suggested by Judge Learned Hand in *Sherman National Bank v. Shubert Theatrical Co.* D.C. 238 F 225, 230, *supra* the case may hereafter have to be transferred to the law side of the court for jury trial or dismissed with respect to the balance of the claim of Mrs. Kegan after final and effective decree regarding the smaller sum of \$13,035. . . ."

Other authorities are:

Sherman National Bank v. Shubert Theatrical Co. (DC SD NY 1916), 238 F. 225, *aff'd* 247 F. 256.

Standard Surety & Casualty Co. v. Baker (CCA 8th Cir. 1939), 105 F. 2d 578.

Edner v. Mass. Mutual Life Ins. Co. (CCA 3rd Cir.), 138 F. 2d 327.

Gen. Am. Life Ins. Co. v. Floom (DC Pa.), 96 Fed. Supp. 488.

The appellant, however, spurned its remedy of a suit in the nature of interpleader, or statutory interpleader, and made no gesture towards filing a bond or paying into court a sufficient sum to reimburse the appellee Lee as to interest, costs and attorneys' fees, if it should be adjudicated that he is entitled to these sums.

It continued to spurn this remedy, in filing its brief herein, for it asserted therein (p. 20), "If it is a proper case for interpleader, then there can be no issue as to the insured's right to attorneys' fees."

Since the requirements of a strict or pure bill of interpleader were not met by appellant and appellant is determined to ignore its remedy of a bill in the nature of interpleader, or statutory interpleader, by paying into court or securing the payment of any additional claims of the appellee Lee, which arose by reason of its conduct in repudiating its liability under the policy, the trial court properly dismissed the interpleader.

There Are Not Two Colorable Adverse Claimants to the Fund Deposited in the Registry of the Court

It can be demonstrated that the claim of Florence Grusenmeyer to the proceeds of this policy is sham and frivolous, and that appellant knew or should have known it.

FIRST: The net cash value of the policy at the time of the annulment was less than at the time of the purported marriage (R. 21, 22, Findings IX, XV).

Without considering the laws of California, this demonstrates that any community funds paid as premiums had been withdrawn as loans, and that no interest in the policy existed in favor of the alleged community or the present Florence Grusenmeyer at the time of the annulment. Any premiums paid with community funds, in excess of the amount withdrawn as a loan, was the cost of the protection aspect of the policy during the existence of the alleged community.

Any claims that Florence Grusenmeyer might have as to the money secured from the appellant as such loan are not involved in this case.

SECOND: Appellee Lee has the unrestricted right to change the beneficiary of the policy (R. 33, Finding V). Under California law, the appellee Grusenmeyer had no rights in and to the policy as such; *New York Life Ins. Co. v. Bank of Italy*, 40 Cal. App. 242, 214 P. 61, even if community funds were used to pay the premiums: *Shoudy v. Shoudy*, 55 Cal. App. 447, 203 P. 437; *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, 139 P. 242; *Union Mutual Life Ins. v. Broderick*, 196 Cal. 497 at 506, 238 P. 1034.

THIRD: Assuming that the cash value of the policy had been increased by payment of premiums by community funds, any rights of the appellee Grusenmeyer would not have been in the policy or its proceeds, but a

separate right against the appellee Lee with which the appellant would have no concern.

The California court had a similar situation in front of it in the case of *Gelfand v. Gelfand*, 136 Cal. App. 448, 29 P. 2d 271, where the court held, under such circumstances, the wife had no claim against the policy or its proceeds, but had a claim against the husband's separate property to the extent community funds had increased the value of the policy.

In the instant case, since there was no increase in the net cash value of the policy, no such claim could have existed.

The appellant knew, or should have known, these facts. The low esteem in which it originally held the claim of the appellee Grusenmeyer is demonstrated by the fact that although she demanded that no change of beneficiary be allowed (R. 54, Ex. 2) appellant did, after receipt of that claim, change the beneficiary to Isabel Clark at the request of the appellee Lee (R. 22, 23, Finding XVI, also R. 62).

The appellee Grusenmeyer, in making her claim, was not content to demand the increase in cash value during the existence of the alleged community, but wanted and wants the entire cash value of the policy (R. 16, 17, 54). However, she has indicated (R. 68, Ex. 9) that she does not value this claim highly enough to appear in court to press the same. Apparently appellant, now, values it more highly than she. Appellant urges that because the trial court struck out proposed Finding No. XXV (R. 39), this shows the trial court did not regard the claim

as sham and frivolous. It is submitted that the trial court could have regarded this finding as surplusage as the other findings clearly show the claim of the appellee Grusenmeyer to be sham and frivolous.

This claim is so patently sham and frivolous that the trial court rightly dismissed the complaint. Under the authorities, such dismissal was proper:

A case illustrative of this point is *Mutual Life Insurance Co. of New York v. Egeline* (DC ND Calif.), 30 Fed. Supp. 738, where the court said (p. 740):

“ . . . if plaintiff knows to which of the claimants he can rightfully or safely pay, and thus protect himself, or if the hazard to which he conceives himself to be exposed has no reasonable foundation, he cannot maintain this equitable remedy. Pomeroy's Eq. Jur. vol. 4, Sec. 1459, p. 3452; id Sec. 1461, p. 3457; Daniel, Chancery Practice, Sec. 1560; Story's Eq. Pl. Sec. 291, p. 289. . . .”

In *Royal Neighbors of America v. Lowary* (DC Mont.), 46 F. 2d 565, the court said:

“Complainant knew or in ordinary diligence could have known to whom and in what proportions the amount of the certificate is payable, and it is well settled this defeats interpleader, even though any dissatisfied claimant might threaten a hopeless suit, though none alleged. There can be no resort to equity save in case of real necessity, and not merely as a convenient escape from duty and labor at the cost of the beneficiaries, generally including fat fees for insurer's counsel. . . .”

In *Mass. Mut. Life etc. v. Murdock* (DC Oregon), 56 Fed. Supp. 500, the court in discussing a situation such as the instant one where only one party contested the interpleader, said:

“Although if in the exercise of that jurisdiction it is determined that two apparently valid claims do not exist, the suit might be dismissed and the deposit released.”

See also:

New York Life Ins. Co. v. Valz (CCA 5th Cir.),
141 F. 2d 1014.

48 C.J.S., Interpleader, Sec. 14, p. 52.

Argument on the Issue of Attorneys' Fees

Appellant asserts that the reason the interpleader was dismissed was because the trial court felt that if it allowed the interpleader, the insured would be denied the right to recover attorneys' fees under Oregon statutes.

This undoubtedly was one of the reasons for the dismissal.

Consider this fact situation: Although all the facts were known to the appellant, and although it had refused to recognize the demands of the appellee Grusenmeyer that the beneficiary be not changed, when this controversy arose it did not hold the matter in abeyance or even file an interpleader. Although it knew the appellee Lee wanted the cash value, it asserted that unless additional premiums were paid, the cash value would be lost (R. 64, 65, 66, Ex. 6, 7).

At this point appellee Lee had no alternative, if he wished to enforce his rights under the policy, but to commence action. Even after that, the appellant asserted that the cash value of the policy had been lost (R. 67, Ex. 8).

Apparently appellant reconsidered its position at that time and determined that it had been wrong in denying payment, but it still wished to avoid liability for interest, costs and attorneys' fees.

Although the demand in the state court action was in excess of \$3,000 and appellant could have removed the same to the United States Courts, it chose to commence this separate action, but paid into court only the face amount of the cash surrender value.

What the appellant has tried to accomplish here is illustrated by a case also involving the appellant, where originally liability was denied, and afterwards in an effort to escape liability for attorneys' fees, etc., the appellant filed a bill in interpleader. In *New York Life Insurance Co. v. Veith* (Texas Civil Appeals), 192 S.W. 605 at 607, the court said:

"Appellant cannot be permitted to deny all liability to the beneficiary named in an insurance policy for a year and then, when it ascertains it cannot maintain its defense, file an interpleader in order to escape the statutory penalties. No case has been cited which tends in the least to justify the acts of appellant."

And, in *Andrews v. Travelers Insurance Co.* (Ga.), 89 S.E. 522, in a syllabus by the court, it was held that in a case where one of the defendants had sued the insurance company not only for the face of the policy, but also for damages and attorneys fees, an order allowing interpleader upon payment into court of the face amount of the policy only was erroneous because it ignored the fact that one of the contestants not only

claimed to be entitled to the proceeds of the policy but also sought a judgment against the company for damages and attorneys' fees which would be cut off by the order of the court without a trial.

In *Metropolitan Life Insurance Co. v. Brown* (Mo.), 186 S.W. 1155, in commenting upon such a situation, the court said:

“ . . . It cannot be that appellant can defeat this claim by ignoring it entirely and tendering and arbitrarily compelling the claimant to accept a much smaller sum. . . . ”

See also:

Couch on Insurance, Sec. 2125, p. 6881, Note 9.

Whether the allowance of attorneys' fees in such a case be considered compensatory or punitive, there was a necessity for the appellee Lee to commence the action in the state court, and the right to attorneys' fees and costs accrued in his favor.

Under such circumstances, can it be said that Lee should not be given the full benefit of the Oregon statutes pertaining to attorneys' fees, interest, and costs allowable in such cases as this? The appellant not only has endeavored to deprive him of these rights, but also asserts the right to have its attorneys compensated out of the fund. (R. 25, Plaintiff's contention No. 9, Pre-trial Order.)

As set out in appellant's brief (p. 19) the purpose of the statute awarding attorney fees is to “discourage lengthy and expensive litigation,” but appellant, in its

efforts to avoid its liability in this respect, has made this litigation exceedingly lengthy and exceedingly expensive.

It is to be noted that the memorandum of the Court (R. 31) says that it does not seem right "under the circumstances here present" that the appellant avoid the state statute respecting attorneys' fees (R. 31).

Under the circumstances we respectfully submit that the question of the allowance of attorneys' fees to the appellee Lee was a proper one for the trial court to consider, and the attempted evasion thereof by the appellant a proper reason for denying the interpleader.

Since the claim of Florence Grusenmeyer is so palpably baseless, as heretofore shown, the question of attorneys' fees undoubtedly was not the only reason for the court's decision.

CONCLUSION

In conclusion it is respectfully urged that the court rightfully dismissed the interpleader and relegated the appellant and the appellee Lee to their rights and liabilities in the state court action.

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United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, Formerly Florence Lee,

Appellees.

**APPELLANT'S REPLY BRIEF TO BRIEF OF
APPELLEE, ARTHUR L. LEE**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

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United States
COURT OF APPEALS
for the Ninth Circuit

NEW YORK LIFE INSURANCE COMPANY,
a corporation,

Appellant,

vs.

ARTHUR L. LEE and FLORENCE GRUSEN-
MEYER, Formerly Florence Lee,

Appellees.

**APPELLANT'S REPLY BRIEF TO BRIEF OF
APPELLEE, ARTHUR L. LEE**

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

**REPLY TO ARGUMENT THAT NO VALID
BASIS FOR INTERPLEADER EXISTS**

Appellant commenced this case in the United States District Court for the District of Oregon under the Federal Interpleader Statute (28 U.S.C.A. 1335) which gives the District Court jurisdiction of any civil action of interpleader or in the nature of interpleader. Appellee Arthur L. Lee first contends and argues that appel-

lant did not meet the requirements of a civil action of interpleader because it was not a neutral stakeholder. The factual situation proves otherwise and an examination shows that at the time of the commencement of this civil action the appellant stood as a neutral stakeholder of the cash surrender value of the policy of insurance which was the money or property or benefits arising by virtue of such policy or instrument or obligation.

The policy of insurance sets forth the "Benefits on Surrender or Lapse" (R. 60) and under the provisions of this section of the policy the insured may, after two full annual premiums have been paid and within three months after any default in payment of premium, but not later, surrender the policy and (a) receive its cash surrender value or (b) receive non-participating paid-up insurance. However, if the insured shall not within three months of any default in payment of premium surrender the policy and receive the cash surrender value or receive non-participating paid up insurance, then the insurance shall be automatically continued as temporary (or extended term) insurance without the right to the cash surrender value of the policy of insurance.

In this case the insured was advised by the appellant in a letter on December 18, 1952 (R. 64) that premiums on the policy were paid to November 6, 1952, and the cash value would be available until February 6, 1953, (or within three months of the defaulted premium which was due November 6, 1952). Further that if he desired the cash value while available, he should return the pol-

icy (surrender it) with attached request for the cash value signed by the insured and consented to by Florence Grusenmeyer and the cash value would be paid to the insured.

Then on January 13, 1953, by letter (R. 66) the appellant called the insured's attention to its prior letter of December 18th and also that the cash surrender value would be available until February 6, 1953, providing no further premiums are paid.

Since appellee Arthur L. Lee did not on or prior to February 6, 1953, surrender the policy of insurance and submit the request for cash value signed by himself and consented to by Florence Grusenmeyer, the insurance was, according to its terms, automatically continued for the face amount of the policy as temporary (or Extended Term) insurance and appellee Arthur L. Lee was so notified by letter dated June 5, 1953 (R. 67).

After February 6, 1953, the date on which the policy of insurance was automatically continued as Temporary Insurance and in May, 1953, appellee Arthur L. Lee commenced his action in the Circuit Court of the State of Oregon for the County of Multnomah seeking the recovery of the cash surrender value.

Thereafter and in July, 1953, appellant filed this interpleader suit and paid the cash surrender value of the policy into the registry of the Court.

It is now contended by appellee Arthur L. Lee that since the policy of insurance at the time he started his State Court case for the cash surrender value was continued as Temporary Insurance that appellant was not

a neutral stakeholder as required in interpleader suits. This may be maintainable by the appellee Arthur L. Lee except for the fact that the appellant, for the purposes of this interpleader suit and in order to give both claimants to the fund an opportunity to assert their claims and have them determined in a Court where jurisdiction over both appellee Arthur L. Lee and appellee Florence Grusenmeyer could be had, waived the strict requirements of the policy and paid the cash surrender value into the registry of the Court. Certainly at the time of the commencement of this suit appellant was a neutral stakeholder of the fund in question.

The next point made by the appellee Arthur L. Lee under his contention that "No valid basis for interpleader exists" is that appellant did not pay into Court a sufficient amount or file a sufficient bond to cover the amount claimed by appellee Lee. Here the appellee Arthur L. Lee first goes into an explanation of the essential difference between a "strict bill in interpleader" and "a bill in the nature of interpleader" and cites cases in which the distinction has been discussed. From an examination of the authorities cited we find the essential difference being not as stated by appellee Arthur L. Lee but rather that in a strict bill in interpleader the plaintiff as stakeholder must not have any interest in the fund or claim thereto adverse to any of the defendants who are claimants thereto. While in a bill in the nature of an interpleader the plaintiff need not be a mere stakeholder but may claim an interest in the fund or subject of the controversy between the defendants or claimants.

Appellee Arthur L. Lee argues that this is a bill in the nature of interpleader because his claim is for the cash surrender value of the policy of insurance of \$1,711.25 with interest, attorneys' fees and costs and appellee Florence Grusenmeyer's claim is for the cash surrender value of \$1,711.25.

Therefore, the plaintiff by paying into Court the cash surrender value of \$1,711.25 and not filing a bond or paying a larger amount into Court to cover the interest, costs and attorneys' fees, said appellee Arthur L. Lee contends that plaintiff is claiming an interest in the fund or subject of the controversy.

We point out to the Court that the plaintiff is not in any manner asserting or making any claim whatsoever to the amount due on the policy of insurance, that is the cash surrender value of \$1,711.25. That is the amount which both claimants agree or admit or contend to be due on the policy (R. 37, Finding XVII). The cash surrender value of \$1,711.25 is the amount due on the obligation according to its terms and conditions.

It is true that the appellee Arthur L. Lee has demanded interest, attorneys' fees and costs, but such a claim on his part for something over and beyond the agreed amount of the fund or cash surrender value of the policy does not create an interest on the part of the plaintiff in the fund or subject of the controversy so as to construe this suit as anything other than a bill in interpleader. Where is the claim or interest of the plaintiff in the fund or subject of the controversy between the defendants or appellees herein? Nowhere has the

appellee Arthur L. Lee pointed to any such rights under the terms of the policy because no such right for attorneys' fees, interest or costs are provided for.

The appellees both claim the fund that is the cash surrender value of the policy and appellant is a disinterested stakeholder and complied with the requirements of the Federal Interpleader Statute.

The case of Federal Life Insurance Company vs. Looney, 180 Ill. App. 488, cited by appellee Arthur L. Lee was decided in May, 1913, by the Illinois Appellate Court, First Division, and the facts in that case are that each of two claimants were claiming an entirely different amount to be due as the fund payable by the plaintiff insurance company and the plaintiff had not, as in the instant case, paid into Court the amount due on the policy of insurance. The amounts due each claimant had been previously determined by other litigation in the Tennessee Supreme Court.

In the next case cited by the appellee Arthur L. Lee, Connecticut General Life Insurance Company vs. Yaw, 53 F. 2d 684, is a District Court of New York case decided in November, 1931, in that case the face amount of the policy was \$1,000.00 and at least one claimant contended such amount with interest to be due. The plaintiff denied the face amount of the policy to be due and paid into Court only \$841.45 at the time of filing its interpleader. This created a dispute as to amount owed by the plaintiff. This is a different situation from that in the case at bar where the amount of the obligation of the policy is not in dispute. It is agreed by all

parties that the cash surrender value is \$1,711.25, the amount paid into Court by appellant.

The cases of *Heineman vs. Heineman, et al.*, 50 F. 2d 696, and *Hooper vs. Carlson*, 134 Or. 241, 293 P. 410, are not interpleader cases and only stand for the proposition that the plaintiff in interpleader must be a disinterested stakeholder of the fund or property and that the bill must allege the true amount owing. Appellant herein is a disinterested stakeholder of the fund, cash surrender value of the property, and has alleged in his bill the true amount owing.

The appellee Arthur L. Lee cites two further cases, *U. S. vs. Sentinel Fire Insurance Company*, 178 F. 2d 217, and *John Hancock Mutual Life Insurance Company vs. Kegan*, 22 Fed. Supp. 326. The facts in these cases are entirely different from the case before this Court. In the first case which resulted from a fire loss on a policy of fire insurance of the face amount of \$17,000.00 the plaintiff admitted the fire loss and their liability to be \$14,133.33 while the claimants contended for the face amount of the policy of \$17,000.00. The facts of this case support a controversy as to the amount due on the policy, which is not the situation in the instant case.

REPLY TO ARGUMENT THAT THERE ARE NOT TWO ADVERSE CLAIMANTS

Appellee Arthur L. Lee next contends that there are not two adverse claimants. His argument first is that even though appellee Florence Grusenmeyer had twice communicated with appellant in writing, each time claiming some interest in the policy (R. 54-55) and appellant's knowledge that appellee Lee and appellee Grusenmeyer resided for some time in a community property state (California) (R. 21) that appellant should have evaluated her claim and decided that she had no maintainable claim. The very purpose of interpleader is to give the stakeholder an opportunity to eliminate the risk of additional liability from guessing wrong as between adverse claimants. It is not appellant's burden to decide on the merits of the claims. The fact that an adverse claim was being made is sufficient and in this case not only did appellee Grusenmeyer assert her claim on two occasions but after service of summons and complaint in the interpleader action she appeared and answered claiming the entire fund deposited in the registry of the Court.

In the case of Metropolitan Life Insurance Company vs. Segaritis, et al., 20 F. Supp. 739, one of the defendants and a claimant made the same argument and contention as appellee Arthur L. Lee, and the Court at page 741 stated "it has become clear that the jurisdiction of this Court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in al-

most every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and can not affect the jurisdiction of the Court."

The net cash value of the policy at the time of the annulment does not alter the situation. It is not a question of the amount involved. The fact is that appellee Grusenmeyer was asserting a claim to the policy or proceeds adverse to the appellee Arthur L. Lee and that is sufficient to meet the statutory requirements of interpleader.

In reply to appellee Arthur L. Lee's statement, page 11 of his brief, to the effect that appellee Grusenmeyer had no rights in and to the policy as such, we call the Court's attention to the case of *Blethen vs. Pacific Mutual Life Insurance Company of California, et al.*, 198 Cal. 91, 243 P. 431, in which the Court considered the question presented which was

"The principal question presented by this appeal is whether or not a surviving wife may maintain an action against an insurance company to recover her community interest in the proceeds of a life insurance policy issued to her husband and made payable to a beneficiary other than the wife, without the wife's consent, the premiums of which have been paid out of community funds, after the insurance company, in good faith without notice of adverse claim thereto, has made full payment on the policy to the beneficiary designated in the policy."

The facts were substantially the same as in the case at issue except that no notice of adverse claim was made until some ten months after the insurance com-

pany had paid the money to the beneficiary under the policy and the plaintiff, the adverse claimant, sued the insurance company for her share of the proceeds of the policy of insurance. In answering this question the Court decided in the negative because no notice of the adverse claim had been given the insurance company.

In this case appellee Grusenmeyer first gave notice of her claim or refusal to consent to a disposition of her community interest in said policy or proceeds on December 21, 1932 (R. 54), and appellant was on notice thereafter.

Examining the cases cited by appellee Lee (Br. of A. Lee, page 11) in support of his contention, we find that in *McEwen vs. New York Life Insurance Company*, 23 Cal. App. 694, 139 P. 242, the facts to be that the plaintiff was the mother of the insured and sought to recover the proceeds of a policy of insurance on the life of her deceased son and in which she was named as beneficiary. The insured had the right to change the beneficiary but had not done so prior to his death. The defendant insurance company defended on the ground that material misrepresentations had been made by insured in the application. Plaintiff contended that she had a vested interest in said policy by being named as beneficiary. In deciding in favor of the defendant company the appellate Court said that since the insured had the right to change the beneficiary named in the policy, it must follow that plaintiff had no vested interest therein. This case is not in point. There was no husband and wife relationship or question of community funds or property.

In Shoudy vs. Shoudy, 55 Cal. App. 447, 203 P. 437, cited by appellee Lee, we find that the community rights of the plaintiff, who was the divorced wife of the insured and a former beneficiary under the terms of a policy of insurance, had been settled and terminated in the divorce proceeding. In the case before this Court such was not the case. The annulment proceedings did not determine the community rights or any property rights (R. 36, Finding XIV) of appellee Florence Grusenmeyer and her community rights in the policy of insurance are still available to her.

REPLY TO ARGUMENT ON ATTORNEYS' FEES

In this case the appellant acted in good faith. As early as March 5, 1951, appellee Arthur L. Lee knew that no transaction under the policy of insurance could be made without the consent of Florence Lee (Grusenmeyer) (R. 63). On December 1, 1952, appellee Arthur L. Lee made his demand for the cash surrender value of the policy (R. 37, Finding XVII) and on December 18, 1954, he was advised by appellant that he could surrender the policy according to its terms but that the cash surrender value could not be paid to him alone without the consent of Florence Grusenmeyer in view of her claim (R. 64). No response of any kind was made by appellee Arthur L. Lee thereafter and appellant had the right to assume that some effort was being made to secure the consent of appellee Grusenmeyer. Then on May 4, 1953, within 5 months of his demand

and notice from appellant of the requirement for appellee Lee to receive the cash surrender value he commenced his action in the State Court against appellant (R. 5).

Appellee Arthur L. Lee now seeks to penalize the appellant for giving him an opportunity to resolve the conflicting claims.

In the case of New York Life Insurance Co. vs. Veith (Texas Civil Appeals), 192 S.W. 605, cited by appellee Arthur L. Lee, the facts were that the plaintiff insurance company refused to pay anything on the ground that the wife, who was the beneficiary, had murdered her husband, the insured, and maintained this position for one complete year before filing its interpleader. There is no analogy between such a situation and the facts in this case.

In the case of Andrews vs. Travelers Insurance Co. (Ga.), 89 S.E. 522, the opinion of the Court did not even discuss the Headnote or Syllabus of the reporter.

In the case of Metropolitan Life Insurance Co. vs. Brown (Mo.), 186 S.W. 1155, the case was decided on a demurrer sustained to the petition by the only claimant and defendant to appear and the Court said, "Plaintiff had no reason to be in doubt either in law or in fact as to whom it might pay the fund and thus discharge itself."

We recognize that there are situations and circumstances under which attorneys' fees are allowed against insurance companies when payment of claims have not

been made but this is not one where any allowance should be made.

Within a reasonable time and without undue delay, the appellant commenced its interpleader suit in the District Court where jurisdiction of both appellee Lee, a resident of Oregon, and appellee Grusenmeyer, a resident of California, could be maintained and be given the right to litigate their claims.

Appellee Lee admits that one of the reasons for the dismissal of appellant's interpleader by the Trial Court was attorneys' fees (R. 31). If the requirements of the Federal Interpleader Statute are present, then we submit that this issue should not have been the basis for the Trial Court's decision.

Appellant is not conceding that appellee Lee would be entitled to attorneys' fees in his state action. In any event this is not the forum to litigate that question and should have no bearing on the question before this Court.

CONCLUSION

It is respectfully submitted that judgment of the District Court should be reversed and appellant granted the relief prayed for in its complaint for interpleader.

Respectfully submitted,

DAVIS, JENSEN, MARTIN & ROBERTSON,
By ROLAND DAVIS,
THEODORE B. JENSEN,
Attorneys for Appellant.



IN THE
United States Court of Appeals
For the Ninth Circuit

BILTMORE MUSIC CORPORATION and HERBERT
BROWNELL, JR., Attorney General of the United
States, as Successor to the Alien Property Custodian,

Appellants,

vs.

ROBERT W. KITTINGER,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANTS' OPENING BRIEF

ABRAHAM MARCUS,
Attorney for Appellant,
Biltmore Music Corporation.

LAUGHLIN E. WATERS, *U. S. Attorney,*
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Appellant HERBERT BROWNELL, JR.,
Atty. Gen. U. S.

On the Brief:

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FILED

JUL 11 1957

PAUL P. O'BRIEN, CLERK

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IN THE
United States Court of Appeals
For the Ninth Circuit

No. 14625

BILTMORE MUSIC CORPORATION and HERBERT BROWNELL, JR.,
Attorney General of the United States, as Successor to
the Alien Property Custodian,
Appellants.

VS.

ROBERT W. KITTINGER,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA, CENTRAL DIVISION

APPELLANTS' OPENING BRIEF

I

Statement as to Jurisdiction.

This is an action for infringement of statutory copyrights seeking injunctive relief and money damages (3).^{*} The action was tried on an Agreed Statement of Facts (39). Judgment was entered October 15, 1954 (86), dismissing the complaint (as well as a counterclaim asserted by defendant as to which no appeal is taken) and taxing costs of \$250 in favor of defendant against plaintiff Biltmore Music Corporation. The cause of action in the complaint arose under the Copyright Law of the United States (17

^{*} References are to Transcript of Record.

United States Code, Sections 1 to 215, inclusive) and the Trading With the Enemy Act (50 United States Code, Appendix Section 17) and jurisdiction is based upon Section 1331 of Title 28 of the United States Code as Amended. Jurisdiction of the Court on appeal exists under 28 United States Code, Section 1291.

II

Statement of the Case.

Preliminary

The United States Attorney General is the copyright proprietor, by succession to the Alien Property Custodian (40) who was vested with ownership of the statutory copyright of certain German nationals, in a musical composition entitled "Du Kannst Nicht Treu Sein", hereinafter called the "basic work" (44).

Plaintiff Biltmore Music Corporation (hereinafter called "Biltmore") is the licensee of the Attorney General with respect to a new arrangement of the basic work "by Ken Griffin (American) with English lyrics by Hal Cotten (Pseudonym for J. F. Bard and Dave Dreyer) (45, 17-18) which hereinafter will be referred to as the "new work", the musical part of which will be called the "new arrangement".

The action (3) was instituted by plaintiffs for copyright infringements by defendant of (a) the basic work and (b) the new work (11) by the use of the new arrangement in a phonograph record entitled "You Can't Be True" which was manufactured and sold by Chicago Recording Studios, Inc., a corporation under the management and control of defendant (42) who was its president and general manager and who arranged for the recording, release, and sale of all its phonograph records (41).

A. The Agreed Statement of Facts

Having been tried on an agreed statement of facts (39), the case presented no issue of fact, and reference to the pleadings is unnecessary. The facts stipulated by the parties included:

Prior to 1935 two German nationals composed the lyrics and music of a musical composition entitled "Du Kannst Nicht Treu Sein" (the basic work) which was duly registered for copyright in this country and received registration No. E. For. 39841 (40). Plaintiff Attorney General is the successor in interest to the copyright by virtue of transfer by law from the Alien Property Custodian who had seized it on February 24, 1948 pursuant to the Trading With the Enemy Act (44). Validity of the copyright and ownership by the Attorney General is uncontested.

Prior to August 20, 1947 one Ken Griffin composed a new arrangement of the basic work without authority of the copyright proprietor (42-43). On that day defendant employed Griffin under a labor union form contract (42) to play eight organ solo compositions one of which was the new arrangement of the basic work (41-42).

In October, 1947 defendant sold phonograph records of the new arrangement under the translated title "You Can't Be True" and sales were made until March 14, 1952 (42). Neither Griffin nor defendant had the permission of the copyright proprietor of the basic work to manufacture or sell the records of the new arrangement (42-43).

Subsequent to recording for defendant, Griffin performed the new arrangement for a recording by another company, a competitor of defendant's company (43). Thereafter Griffin assigned the new arrangement to J. F. Bard on February 17, 1948 (44).

It was not until March 2, 1948 that any right or authority was granted by the copyright proprietor of the basic

work. On that date J. F. Bard Company, Inc. obtained from the then proprietor, the Alien Property Custodian, a license, No. E1277, granting it the right to publish sheet music and issue phonograph records of the composition, limited to the new arrangement by Ken Griffin with English lyrics composed by Dave Dreyer and J. F. Bard (45, 61, 17).

On March 5, 1948 the Bard Company assigned its rights acquired from the Attorney General to Biltmore (45) and J. F. Bard personally orally assigned to Biltmore the rights he had acquired by virtue of Griffin's assignment of the new arrangement (45). On March 9 Biltmore filed a notice of use pursuant to Section 1(e) of the Copyright Law (46) and prior to March 15, 1948 it published sheet music copies of the new work consisting of the new arrangement and the new lyrics (46). The copies bore the required copyright notice, and on deposit on March 15th of two copies in the United States Copyright Office, Biltmore was granted Copyright Registration No. E. Pub. 24797 on the new work. The Copyright Certificate is dated April 9, 1948 (46).

On March 16, 1948 defendant was notified to cease manufacture of the phonograph record "You Can't Be True" on the ground of infringement of copyright (46). Defendant refused; he neither paid the Bard Company, Biltmore, nor anyone else, any license fee or royalties in connection with his phonograph records of the new arrangement (47). Most of the records sold by defendant were sold after written notice to desist and during the period when Biltmore publicized and exploited its new work at substantial expense (47, 42).

B. The Questions Involved

1. Arguments raised below

The defenses below to the obvious infringement of the basic work by defendant's manufacture of the phonograph records of the new and unauthorized arrangement were:

(a) the copyright proprietors of the basic work had failed to file a notice of use when they licensed mechanical reproduction in Germany, and hence mechanical rights thereof are not protectable here.

(b) the alleged infringing acts were committed by a corporation and hence defendant is not personally liable.

As to the new work which had been copyrighted by plaintiff Biltmore, defendant urged

(a) Since plaintiff Biltmore acquired its rights to the new arrangement by an oral assignment, its copyright of the new work of which the new arrangement was a part, was invalid.

(b) Defendant had obtained the right to use the new arrangement from Griffin and his manufacture and sale of phonograph records, although unauthorized by the proprietor of the basic work upon which it infringed, constituted a publication sufficient to dedicate the new arrangement to the public domain; hence Biltmore's copyright of the new work and the notice of use which it filed pursuant to Section 1(e) were both ineffective.

2. The decision below

The District Court, in dismissing the Complaint, held:

1. The basic work was not protectable against defendant's infringement because phonograph records had been manufactured in Germany with permission of the copyright proprietor without the filing of a notice under 1(e) of 17 U. S. C. (84, #3).

2. Griffin had validly licensed defendant's manufacture of records of the new arrangement (85, #4).

3. The manufacture of defendant's record of the new arrangement without the filing of a notice under 1(e) of 17 U. S. C. by Griffin precludes recovery by plaintiffs for infringement by use of the new arrangement (85, #5).

4. The manufacture and sale of phonograph records of the new arrangement by the defendant constituted a publication, and hence the copyright secured by plaintiff Baltimore on the new work (which includes the new arrangement) after such manufacture and sale rendered the copyright registration of the new work invalid (85, #6).

III

Specifications of Error.

The Court below committed the following errors in its Conclusions of Law:

1. Conclusion of Law 3 is erroneous in stating that recovery against defendant for his unauthorized mechanical reproduction of the basic work was precluded by failure of the Attorney General and his predecessors to file a notice of use with respect to the license granted to the German company for such reproduction in Germany (84).

2. Conclusion of Law 4 is erroneous in stating that defendant had received a valid license from the composer of the "new arrangement" to manufacture and sell records of the "new arrangement" (*id.*).

3. Conclusion of Law 5 is erroneous in stating that the failure of Biltmore's predecessor in title to the new arrangement (*i.e.* Griffin, the composer of the new arrangement) to comply with Section 1(e) precludes Biltmore from recovering from defendant for mechanical reproduction of the new arrangement (85).

4. Conclusion of Law 6 is erroneous in stating that there had been a publication of the new arrangement prior to copyright by Biltmore and hence copyright registration of the new work is invalid (*id.*).

The Court below committed the following additional errors:

1. Dismissing the complaint.
2. Failing to grant judgment in favor of plaintiffs for an accounting of profits and for damages.
 - a. as to all records manufactured by defendant,
or
 - b. as to those records manufactured after Biltmore filed its notice of use of the new work pursuant to Section 1(e).

SUMMARY OF ARGUMENT

I. Appellee's manufacture and sale of the phonograph record entitled "You Can't Be True" constitutes an unquestionable infringement of the basic work "Du Kannst Nicht Treu Sein".

(a) Copyright of the basic work is admittedly valid and vested in appellant Attorney General;

(b) The license granted by his German predecessor in title to mechanically reproduce the work in Germany did not require that a notice of use be filed under Section 1(e) of the Copyright Law in order to protect mechanical reproduction rights in this country, because the Copyright Law has no extra-territorial effect.

II. Moreover, the new arrangement of the basic work, recorded by appellee in its phonograph record, without the authority of the copyright proprietor, was also an infringement of the basic work. No rights therein could be acquired by the arranger, or anyone deriving from him, without the consent of the copyright proprietor.

(a) Griffin, the composer of the new arrangement, did not purport to and did not license defendant's manufacture of the phonograph record of the arrangement; if he had, the license would be ineffective because his arrangement constituted an infringement of the basic work and no rights existed in him or his licensee.

III. Biltmore, by virtue of its grant from the Attorney General, the copyright proprietor of the basic work, was enabled to acquire all rights in the new arrangement from Griffin and validly acquired a copyright of the new work of which such arrangement was a part. This new copyright too was infringed by defendant's recordings.

(a) The parol assignment from Griffin's assignee Bard, was valid.

(b) Appellee's unauthorized manufacture and sale of the phonograph record "You Can't Be True", prior to Biltmore's authorized acquisition of the new arrangement, did not constitute a publication so as to place the arrangement in the public domain.

1. The act of the infringer cannot operate to forfeit the rights of the true copyright owner;

2. The manufacture and sale of phonograph records do not constitute a publication so as to place the work in the public domain whether or not previously registered for copyright.

IV. Appellee's failure to account and pay royalties after the filing of Biltmore's notice of use subjects him to the penalties provided by the Copyright Law. The penalty for failure to file a notice of use under Section 1(e) of the Copyright Law is not a forfeiture of the mechanical reproduction right, and hence even if any such failure existed in the instant case, it would at most only protect defendant with respect to infringements prior to the filing of the notice of use by plaintiff Biltmore and notification to defendant.

V. Appellee is liable individually although the actual manufacture and sale were done by a corporation because

- (a) he managed and controlled the corporation, and

- (b) the liability to be imposed is a tort liability, not contract; hence the corporate veil may be ignored; appellee personally was a tortfeasor by reason of his participation.

POINT ONE

Appellee's manufacture and sale of the phonograph records entitled "You Can't Be True" constitute an unquestionable infringement of the basic work, the musical composition "Du Kannst Nicht Treu Sein".

(a)

Admittedly the copyright is valid and was validly vested in appellant Brownell as Attorney General and his predecessors in title.

The defendant has conceded that the registration of the basic work for copyright as class E. For. No. 39841 was valid (Record,* pp. 69, 72) and that the copyright was validly seized by the Alien Property Custodian to whom appellant Brownell as Attorney General has succeeded (40, 44).

(b)

Neither appellant Brownell nor any of his predecessors in title were obliged in order to protect the right of mechanical reproduction in this country, to file any notice under the provisions of Section 1(e) of 17 U. S. C., the Copyright Act, by reason of the authority granted by appellant's foreign predecessor to manufacture and sell records in Germany, or by reason of any other fact.

The sole ground of defense urged below to the claim of infringement of the basic work, and the sole ground of the dismissal of that claim by the District Court was that the failure to file a notice of use with respect to the authorized manufacture of phonograph records in Germany precluded recovery against the defendant.

* Refers to page of original record, not printed in Transcript. Reference to numbers, without the word "Record" refers to page in Transcript.

The extra-territorial effect which the decision of the District Court gives to our Copyright Law is contrary to every decision on the subject in this country, to the unanimous agreement of the textwriters, to the administrative interpretations of the Copyright Law, and to the decisions in other countries upon whose laws our statute is patterned.

While it is true that Section 1(e) does not in express language confine the filing requirement to cases where the mechanical use is a domestic one, judicial interpretation of the entire section, of the corresponding enforcement provision, Section 101(e) and other sections of the Copyright Law, indicates it is intended to be so limited.

Thus, in *G. Ricordi & Co., Inc. v. Columbia Gramophone Co.*, 270 Fed. 822 (S. D. N. Y. 1920), an action to recover damages for unauthorized manufacture of phonograph records pursuant to Section 25(e), predecessor of 101(e), defendant sought to escape liability on the ground that certain of the records had been manufactured in Canada. While the contention was accepted, it was found that the records had all actually been manufactured in this country. The opinion is clear, however, that had they been manufactured in Canada, there would have been no liability and the Copyright Law would be given no extra-territorial application.

A similar avoidance of extra-territoriality in copyright is found in *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, 60, 69-70, 71, 75-76 (S. D. N. Y. 1954). It was there held that the recording of a musical work abroad will not invalidate mechanical or other rights in the copyright subsequently obtained as a result of authorized publication in this country. The decision in the *Mills* case, the opinion in which does not mention any notice of use, is directly in point, for the same question is involved—whether an authorized mechanical use in a foreign country has the same consequence as such a use in this country.

In *Italian Book Co. v. Cardilli*, 273 Fed. 619 (S. D. N. Y. 1918) the argument was made that a musical composition which had been published in Italy without a notice of copyright required by our Copyright Law was in the public domain in this country (under the rule stated in 1774 in *Donaldson v. Becket*, 7 Brown's Parl. Cases 88, 4 Burroughs 2408 and followed since). The Court rejected the argument and said:

"The whole line of cases, holding that publication without copyrighting destroys the right to a subsequent copyright, are either founded on statutes differing from the present one, or on a proven publication in the country of the court rendering the decision. It seems to me as a matter of first impression that the publication in Italy was, by the terms of the notice printed or stamped on each copy sold, limited to Italy, and did not (in the absence of statutory prohibition) prevent the subsequent American copyright, if (as in the case here) there had been no publication in the United States prior to that of the copyright owner" (at p. 620).

More than twenty years later, in *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41 (S. D. N. Y. 1939) another judge of the same Court declined to follow that holding. Several years later, however, the *Basevi* case was expressly overruled by the Court of Appeals in *Heim v. Universal Pictures Co., Inc.*, 154 F. 2d 480 (2d Cir. 1946). In that case the musical composition had been published in Hungary in 1935 with a copyright notice incorrectly stating the year of copyright as 1936. The argument was made that placing a later incorrect year in the copyright notice invalidates the copyright (*Baker v. Taylor*, Fed. Cas. No. 782 (S. D. N. Y. 1848); *American Code Co. v. Bensinger*, 282 Fed. 829, 836 (2d Cir. 1922); *Howell, The Copyright Law*, 3d Ed. 72; *Ladas, The International Protection of Literary and Artis-*

tic Property, 746; *Shafter, Musical Copyright*, 98). In avoidance of such consequence it was argued that the publication in a foreign country did not constitute a publication within Section 9 which would require the affixation of a proper copyright notice. Judge Frank said:

“ * * * We construe the statute, as to a publication in a foreign country by a foreign author (i.e., as to a publication described in the 1914 amendment), not to require, as a condition of obtaining or maintaining a valid American copyright, that any notice be affixed to any copies whatever published in such foreign country, regardless of whether publication first occurred in that country or here, or whether it occurred before or after registration here.

“It seems to be suggested by some text-writers that, under the 1914 amendment, where publication abroad precedes publication here, the first copy published abroad must have affixed to it the notice described in Sec. 18. Such a requirement would achieve no practical purpose, for a notice given by a single copy would obviously give notice to virtually no one. There is no doubt textual difficulty in reconciling all the sections, as has been often observed; the most practicable and, as we think, the correct interpretation, is that publication abroad will be in all cases enough, provided that, under the laws of the country where it takes place, it does not result in putting the work into the public domain. Assuming, arguendo, that plaintiff's publication in Hungary did not do so, it could not affect the American copyright that copies of his song were at any time sold there without any notice of the kind required by our statute, and it would therefore be of no significance, in its effect on the American copyright, if copies sold in Hungary bore a notice containing the wrong publication date” (at pp. 486-487).

The view expressed in the standard treatise on British Copyright Law, *Copinger and Skone-James, Law of Copyright* (8th ed.), is that foreign licensing to record does not have the same consequence as a domestic license (at p. 230):

“It is thought that to comply with this provision contrivances must previously have been made within some part of His Majesty’s Dominions to which the Act applies; and that the fact that contrivances had been made in a foreign country with the acquiescence of the owner of the copyright would not afford a ground for compulsory license here. It would seem that this Act can only intend to avoid exclusive licenses of the right conferred by it and cannot be concerned with rights granted by foreign legislatures.”

The British author then cites *Albert v. Hoffnung & Co.*, 22 N. S. W. Reports 75 and *Leo Feist Inc. v. Gramophone Co.* (1928) V. L. R. 420. The *Albert* case decided the precise question presented here. There the English copyright owner had licensed the defendant to record and sell phonograph records of a song. Defendant manufactured the records in England and exported them to New South Wales. Plaintiff was the copyright proprietor by assignment of the New South Wales copyright and sued defendant for infringement of the mechanical rights of its copyright. The Court held that the local copyright proprietor was the sole owner of the mechanical rights in New South Wales and that the grant of recording right in England by the copyright proprietor there was not effective to bring the compulsory license clause of the New South Wales act into play until there had been “local acquiescence” in the authorization to record and sell phonograph records.

Decisions under the British Copyright Acts of 1911 and 1914 are given weight by the courts in this country.

The Washingtonian Publishing Co. v. Pearson, 306 U. S. 30 (1938) at page 42;
Society of European Stage Authors & Composers, Inc. v. New York Hotel Statler Co., Inc., 19 F. Supp. 1, 6 (S. D. N. Y. 1937).

These decisions and text views are the necessary consequence of the basic theory of copyright law which confines the applicability of the statutory enactments of any country to its own territorial limits. *Ferris v. Frohman*, 223 U. S. 424, 434 (1912).

Administrative interpretation to the effect that reproduction by mechanical means in foreign countries is not to be considered the same as reproduction in the United States is indicated by proclamations of the President in granting protection under Section 1(e) to foreign owners of domestic copyrights.

An example is the proclamation applying to Argentina dated August 23, 1934 (49 Stat. 3413) which provides:

“And provided further, that the provisions of Section 1(e) of the Act of March 4, 1909, insofar as they secure copyright controlling parts of instruments serving to reproduce mechanically musical works shall apply only to compositions published after July 1, 1909, and registered for copyright in the United States, *which have not been reproduced in the United States prior to August 23, 1924, on any contrivance by means of which the work may be mechanically performed.*” (Italics supplied.)

To the same effect see Proclamations:

Switzerland, November 22, 1924, 43 Stat. 1976;
 Palestine, September 29, 1933, 48 Stat. 1713;
 Spain, October 10, 1934, 49 Stat. 3420.

This terminology in proclamations is clear recognition of the principle that foreign authors may have the protection of Section 1(e) even though their compositions have been mechanically recorded abroad so long as they have not been released in this country prior to the proclamation date.

Such administrative interpretations are normally accepted by the Courts. As stated by Ball, *The Law of Copyright and Literary Property*:

“When questions have arisen respecting compliance with the statutory formalities, the courts have given respectful consideration to the construction placed upon the copyright statutes by the administrative officers charged with their execution, and have refused to overrule their administrative acts without cogent reasons for so doing” (at p. 62).

Citing:

Hoague-Sprague Co. v. Meyer Co., 27 F. 2d 176 (E. D. N. Y. 1928).

The history of the compulsory license provision and its inclusion in Section 1(e) supports the theory of local application only. Section 1(e) was added to the copyright law in 1909 as a result of the decision in the case of *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U. S. 1 (1908) which held that phonograph records did not constitute copies of a song and hence did not subject the recorder to suit for copyright infringement. The obvious injustice of permitting one to commercially appropriate another's musical work led to the amendment of the Copyright Act so as to provide that mechanical reproduction was an exclusive right of the copyright owner.

Conflicting interests of copyright owners and phonograph record companies were resolved by granting the copyright owner the exclusive right to authorize the first recording. From that time on anyone else would have the advantage of a compulsory license.

The Congressional Committee report is presented in Howell, *Copyright Law*, 3rd Ed. at p. 253, *et seq.* With respect to Section 1(e) it reads:

“Your committee have felt that justice and fair-dealing, however, required that when the copyrighted music of a composer was appropriated for mechanical reproduction the composer should have some compensation for its use, and that the composer should have the further right of forbidding, if he so desired, the rendition of his copyrighted music by the mechanical reproducers. How to protect him in these rights without establishing a great music monopoly was the practical question the committee had to deal with. The only way to effect both purposes, as it seemed to the committee, was, after giving the composer the exclusive right to prohibit the use of his music by the mechanical producers, to provide that if he used or permitted the use of his music for such purpose then, upon the payment of a reasonable royalty, all who desired might reproduce the music” (pp. 259-260).

It is obvious that the Congress was not concerned with the existence of monopolies in foreign countries; that was a matter for the lawmaking bodies of those countries to regulate.

The mechanical protection afforded the basic work in Germany was not granted by the United States copyright but by the German copyright. The question of whether the grant of a license to record in Germany required the

observance of any formality in order to protect the copyright owner with respect to other users of the basic work for mechanical purposes was a matter to be determined by the German law. So far as the United States copyright is concerned—and that is the only question involved in the present case—the basic work has never been authorized for mechanical reproduction in this country.

It is respectfully submitted that the District Court was in error in holding no remedy was available for defendant's flagrant infringement because of the failure of the original copyright proprietor to file a notice of use under Section 1(e) upon licensing German mechanical reproduction.

POINT TWO

Moreover, the new arrangement of the basic work, recorded by appellee in his phonograph record, without the authority of the copyright proprietor, was also an infringement of the basic work. No rights therein could be acquired by the arranger, or anyone deriving from him, without the consent of the copyright proprietor.

The Copyright Law (Section 1) provides:

“EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—
Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

* * *

(b) * * * to arrange or adapt it if it be a musical work; * * *.”

It is obvious from the express terms of the statute that when Griffin made his arrangement of the basic work he was infringing on the copyright.

That the infringer has no rights whatsoever in his infringing arrangement is indicated by *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904 (S. D. Cal. 1950). In that case, plaintiff, the owner of a master recording of a musical composition, brought an action for an accounting and damages against a phonograph record company on the ground of unfair competition in that the defendant was alleged to have appropriated the plaintiff's arrangement of a musical composition. The composer of the musical composition was not a party to the action and did not appear to support either side. The specific question which the Court first considered was whether the arranger had a property interest which could be protected. Plaintiff argued that its license from the composer to record the composition gave it a property right in its own arrangement which could be asserted against the defendant. Pointing out that it is only the copyright owner or the composer of the copyrighted song who may assert rights to the arrangement and to register it as a new work, the Court held:

"I do not think that a mere recording of an arrangement of a musical composition by one who is not the author of the composition is a property right which should be given recognition in equity. It is quite apparent from the rule of the (Patent) Office, to which I refer, that in their interpretation of the copyright act, no recognition of the right of arrangement is given to anyone *except the author*" (at p. 908).

From the entire opinion it appears that the plaintiff in that case had not received a grant of a right to arrange the work which might give him a basis for copyrighting as a new work. The Court pointed out:

" * * * And it is evident from a study of the copyright law, that the Congress did not intend to give recognition to the right of arrangement, disassociated

from the work *itself*, to which the author claims the right. Otherwise, a right could be segmentized and portions of it could be asserted by persons who do not claim *direct* ownership of a musical composition, but merely certain *subsidiary* rights'' (at p. 909).

That a copyright owner is entitled to protection from unauthorized arrangements or versions, as infringements of copyright, was recognized as early as 1845 in *Reed v. Carusi*, Fed. Cas. #11,642, 20 Fed. Cas. 431 (C. C. Md. 1845).

Accord:

Edward B. Marks Music Corp. v. Foullon, 79 F. Supp. 664 (S. D. N. Y. 1948), aff'd 171 F. 2d 905 (2d Cir. 1949);
Jollie v. Jaques, Fed. Cas. #7,437, 13 Fed. Cas. 910 (S. D. N. Y. 1850).

See:

Carte v. Evans, 27 Fed. 861, 862 (D. Mass. 1886).

The Law in England is the same:

Chappell & Co., Ltd. v. Columbia Graphophone Company (1914) Law Reports, 2 Ch. 124 and 174.

Indeed, it would appear that if there is any ownership in the arrangement composed by Griffin it would, apart from his later assignment to plaintiff Biltmore, have become the property of the plaintiff Attorney General or his predecessors. In *Keene v. Wheatley*, Fed. Cas. #7,644, 14 Fed. Cas. 180 (E. D. Pa. 1861), in which it appeared that certain pencilled additions had been made to plaintiff's manuscript, the Court held, on the principle of accession, that the plaintiff was entitled to proprietorship of the additions. It said in its opinion:

“ * * * the literary proprietorship of the principal composition included that of the additions to it which

have been described as written, in pencil, on the complainant's manuscript, and of such other additions as may have been made in writing. These additions, as literary accessions, were incapable of independent proprietorship. *Hatton v. Kean*, 29 Law J. C. P. 20, 7 C. B. (N. S.) 268; Poth Propriete 170-175; Code Nap. 566, 567; and see the citations of other modern European codes in St. Joseph's Concordance * * *.

“In whose handwriting the additions were, does not appear and is not material. That they were conceived and suggested, if not written, by Mr. Jefferson when engaged in assisting the complainant in bringing out the play, is indisputable * * * his relation to her as his employer would have rendered him incapable of acquiring in them an independent proprietorship of his own. The duties of theatrical performers to their employers are, in this respect, like those of artists retained under a standing engagement in any other professional services * * *. The direct application of the principle to literary compositions, their parts, additions, and accessions, is too familiar to require more than a reference to some of the authorities” (pp. 186-187).

Thus, even if Griffin had purported to convey any rights to defendant, it would have been ineffective, for Griffin had no rights to convey. In truth he did not purport to give defendant any license to record his arrangement; he merely accepted employment under a union form contract to render services as a performing “musician” (51). It was defendant's obligation to obtain any necessary license, as is the customary practice.

POINT THREE

Appellant Biltmore, by virtue of its grant from the copyright proprietor of the basic work, validly acquired all rights to the new arrangement from the arranger and thereupon the new arrangement together with the new lyric and translation were properly the subject of a separate valid copyright registered as No. E. Pub. No. 24797. This copyright too was infringed by defendant's recordings.

Appellant Biltmore acquired from Griffin, the infringing arranger of the basic work, and from appellant Brownell's predecessor, the copyright proprietor of the basic work, the right to copyright the new arrangement and the new lyrics.

Appellee admits that the new work, consisting of Griffin's arrangement and the lyrics by Dreyer and Bard, were entitled to copyright registration as a new work.

Griffin had no property right in his unauthorized arrangement which he could transfer to defendant. The right to such new arrangement, if in anyone, became by accession the property of the copyright proprietor of the basic work. In any event, it would appear that appellant Biltmore, by virtue of rights expressly granted in its favor by Griffin and the copyright proprietor of the basic work (the Attorney General's predecessor) had all of the rights necessary for copyright registration of the new work.

(a)

Appellee urged below that Biltmore never validly acquired the right to copyright the new arrangement because the assignment from Bard to Biltmore of Griffin's contribution was oral and unrecorded. The argument was based on the decision in *Group Publishers, Inc. v. Winchell*, 86 F. Supp. 573 (S. D. N. Y. 1949). This argument is bad. The

Group Publishers case concerned itself solely with the statutory requirement for the recording of a written statutory copyright assignment as a condition to the substitution of the name of the assignee in the copyright notice of a pre-existing statutory copyright. Such requirement would not apply to the new copyright covering a new version of the copyrighted work, with a new English lyric and a new musical arrangement. To cover such new version by protecting the new matter and continuing the copyright protection for the old matter therein, a new copyright notice containing a new year and copyright owner (if in fact different from the former) is all that is required. *Wrench v. Universal Pictures Co., Inc.*, 104 F. Supp. 374 (S. D. N. Y. 1952). This was done here. As stated in the *Wrench* case after so distinguishing *Group Publishers*:

“But we agree with plaintiff that here this was not the result, for it was not an instance of a republication of the same work at a later date. The revision of the original story ‘My Heart’s In My Mouth’ we find after comparison to be substantial and sufficient to constitute a new work. *Davies v. Columbia Pictures*, D. C., 20 F. Supp. 809. In addition, it has been republished in chapter form as an integral part of a book which undisputably contains substantial new matter and which as a new work under Section 7 of the Copyright Law 17 USCA Sec. 7 is entitled to separate copyright. *West Publishing Co. v. Edward Thompson, Co.*, 2 Cir., 176 F. 833. And this would be so even if it were found that the chapter and the story ‘My Heart’s In My Mouth’, as first published, were similar. *National Comics v. Fawcett Publications*, 2 Cir., 1951, 191 F. 2d 594. The publication of a new work with its own copyright notice dispenses with the necessity of listing any prior copyright in order to protect it * * *” (p. 378). Accord: *Harris*

v. *Miller*, 50 U. S. P. Q. 306 at p. 310 (S. D. N. Y. 1949) (not officially reported).

Not only, therefore, was the prior recordation of the assignment unnecessary, but since Griffin conveyed common law rights only, his assignment would not even have had to be of a formal nature, or in writing, *Freudenthal v. Hebrew Pub. Co.*, 44 F. Supp. 754, at p. 755 (S. D. N. Y. 1942). See also, *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F. 2d 306 (2d Cir. 1939), where the Court said:

“Since Adolph Hitler did not himself take out the copyright there was no need of a formal assignment by him” (at p. 311).

In *M. Witmark & Sons. v. Calloway, et al.*, 22 F. 2d 412 (E. D. Tenn. 1927), the Court held:

“There was no written assignment, nor was one necessary first, because a. parol assignment is sufficient (*Callaghan v. Myers*, 128 U. S. 617; *Lawrence v. Dana*, Fed. Cas. No. 8136; and, second, because the copyright is in the name of petitioner, M. Witmark & Sons” (at p. 413).

(b)

It should be apparent from the foregoing, that inasmuch as defendant's records embodied the copyrighted new arrangement without authorization from either the copyright owner of the arrangement or of the basic work itself, defendant, besides violating the copyright of the basic work, was additionally infringing the copyright of the new arrangement. Nevertheless, the district court held that the defendant's manufacture and sale of such records of the new arrangement constituted a dedicatory publication and, therefore, the copyright secured by plaintiff, Biltmore, on the new work, which included the new arrangement, was invalid.

(1) This determination is clearly erroneous for it imposes a forfeiture of rights against the copyright owner of the basic work because of the act of an infringer. As we have shown above, when Griffin made his arrangement without authority he was an infringer; as such he had no rights in the arrangement which he had made and could not grant rights therein to anyone without the consent of the copyright owner. It was only upon consent of the copyright owner that any rights could be acquired by anyone in the new arrangement. The decision below completely ignores this and treats the infringing arranger as having rights in the unauthorized arrangement (which necessarily embodies the basic work) which he could transfer to the defendant or could place in the public domain. As the arrangement could not exist as a species of property of the infringer capable of protection or assignment, and was the property of the copyright owner, if of anyone, it would indeed be anomalous to permit a forfeiture based on defendant's unauthorized act of manufacturing phonograph records.

(2) The determination of the district court as to "publication" (on the assumption that Griffin validly could and did license the recordings issued by defendant) raises a question of widespread importance. It raises for consideration the dictum of two district court cases to the effect that the manufacture and sale of phonograph records constitute publication so as to place the musical composition so recorded into the public domain unless it has previously been copyrighted under the Copyright Act. No Court of Appeals has yet considered and determined this question, and we respectfully submit that the instant case should serve as the vehicle for an authoritative announcement on this important question of law.

Prior to 1950 it was the generally held belief in all branches of the music industry that the manufacture and

sale of phonograph records did not constitute a "publication", and that a phonograph record was not a "copy" of the musical composition which it recorded. Hence such use of an uncopyrighted musical composition did not serve to dedicate or forfeit so as to place it into the public domain. See:

Tammenbaum, "Practical Problems in Copyright",
in "Seven Copyright Problems Analyzed", 7, 15
(CCH 1952);

Schulman, "Authors' Rights", id. at 19, 23-25;

McDonald, "The Law of Broadcasting", id. at 31,
45-46;

Burton, "Business Practices in the Copyright
Field", id. at 87, 102-104.

All precedents (discussed *infra*, pp. 28-35) pointed to the correctness of this industry understanding.

In 1950 the District Court in Illinois in *Shapiro, Bernstein & Co. Inc. v. Miracle Record Co. Inc.*, 91 F. Supp. 473, granted judgment for defendant in a music copyright infringement case. The specific ground for dismissal of plaintiff's claim was that the plaintiff's assignor was not the original composer of the music. After pointing out it was not necessary to discuss the other defenses involved, the Court nevertheless said briefly:

"I might also add that the evidence is that Lewis abandoned his rights, if any, to a copyright by permitting his composition to be produced on phonograph records and sold sometime before copyright. It seems to me that production and sale of a phonograph record is fully as much of a publication as production and sale of sheet music. I can see no practical distinction between the two. If one constitutes an abandonment, so should the other" (at p. 475).

On a motion for a new trial which was overruled, the Court rejected the argument that since the records were not copies of the musical composition, the sale of them could not constitute a publication of the musical composition. The Court said:

“It seems to me that publication is a practical question and does not rest on any technical definition of the word ‘copy’.” (at p. 475).

The court adverted to the decision of the Second Circuit Court of Appeals in *RCA Mfg. Co. Inc. v. Whiteman*, 114 F. 2d 86, 88 (1940); cert. den. 311 U. S. 713. In that case the court apparently ruled that whatever “common-law property” existed in a *performance* of a musical composition by the recording of it ended with the sale of the record so that a contractual agreement or express servitude restricting the record to home use was ineffective.

Most recently, however, in *Capital Records, Inc. v. Mercury Records Corp.*, 105 U. S. P. Q. 163 (2d Cir. 1955) (not yet officially reported) decided by the same court on April 12, 1955 the *R. C. A. Mfg. Co.* case ruling as to publication, was severely limited, if not repudiated.

As the primary basis for the decision in the *Shapiro-Bernstein* case was that plaintiff’s assignee was not an originator of the composition claimed to have been infringed, a finding of fact which probably could not successfully be attacked in the appellate court, no appeal was taken from the decision.

The copyright bar questioned the soundness of the reasoning in the *Shapiro-Bernstein* case and took the position that it was not the law. See page 26, *supra*.

In 1954, in *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54, Judge Leibell in the Southern District of New York, holding in favor of plaintiff in a copyright in-

fringement suit, discussed defendant's argument that the work was in the public domain by reason of the manufacture and sale of phonograph records and agreed by dictum that the manufacture and sale of phonograph records in this country would constitute "publication, capable of destroying common-law copyright", relying upon the now dubious authority of *RCA Mfg. Co. v. Whiteman* as well as *Shapiro-Bernstein & Co. v. Miracle Record Co.*, *supra*. Holding, however, that there was no authorized manufacture and sale of records authorized in this country, the court found those cases inapplicable (at pp. 69-70).

Obviously, since plaintiff in that case was successful, there was no ground for its appealing. Thus the question has never been specifically considered and determined by any appellate court. That the dicta of the *Shapiro-Bernstein* case, of the *Mills Music* case, and of the instant case below are erroneous is demonstrated by a review of the theories and cases applicable.

Thus it is fundamental that the broadcasting of a work over the radio does not constitute a publication.

Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. C. Mass. 1934), mod. 81 F. 2d 373 (1st Cir. 1935), cert. den. 298 U. S. 670 (1936); *Brown v. Molle Co.*, 20 F. Supp. 135 (S. D. N. Y. 1937).

Nor does the performance of a legitimate play in a theatre; hence the play need not be copyrighted in order to remain protected.

Ferris v. Frohman, 223 U. S. 424 (1912).

Nor does the exhibition of a motion picture in a theatre.

DeMille Co. v. Casey, 121 Misc. Rep. 78, 201 N. Y. Supp. 20 (1923);

Patterson v. Century Productions, Inc., 93 F. 2d 489, 492 (2d Cir. 1937), aff'g. 19 F. Supp. 30 (S. D. N. Y. 1937), cert. den. 303 U. S. 655 (1938).

Nor does the oral delivery of a lecture.

Nutt v. National Institute, Inc. For the Improvement of Memory, 31 F. 2d 236 (2d Cir. 1929).

Blanc v. Lantz, 83 U. S. P. Q. 137 (Superior Court, Cal., 1949), which questioned the prevailing doctrine exemplified in the foregoing cases did not concern statutory copyright but was based specifically upon the California Civil Code (former Secs. 980, 983), which placed into the public domain any literary property which has been "made public". The Court there held that a radio broadcast and motion picture cartoon use of a musical laugh was a "making public" within the Code sections.

Since it is well established that a performance of a work does not constitute a publication or dedication of such work, no matter the scope of such performance or the size of the audience, it follows that the circulation of the performance embodied in tangible devices, such as records, equally does not.

The purpose and history of our copyright system confirm this conclusion. Even prior to the decision in *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U. S. 1 (1908), and our present (1909) Copyright Act, the view prevailed that publication of a musical composition could take place only through "copies" of the work itself and not through sound reproducing devices. As was stated in *Stearn v. Rosey*, 17 App. D. C. 562 (1901):

"We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and pub-

lished by the complainants, as the *copy or publication* of the same within the meaning of the act. The ordinary signification of the words 'copying', 'publishing', etc. cannot be stretched to include it" (italics ours) (pp. 564-565).

This conception is crystallized in the present Act which defines the date of publication (for musical works) as the earliest date on which "copies" are placed on sale, sold, or publicly distributed, Sec. 26.

The Supreme Court, one year before the present Act, in *White-Smith Music Publishing Co. v. Apollo Co.*, *supra*, had held that "copies" must be visual ones—"written or printed" * * * "in intelligible notation" * * * "which others can see and read" (p. 17) and that mechanical sound reproducing devices could not be such (p. 18). Its decision had been anticipated in *Kennedy v. McTammany*, 33 Fed. 584 (D. Mass., 1888), appeal dismissed 145 U. S. 643 (1891), from which Justice Day quoted with approval:

"I cannot convince myself that these perforated sheets of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form a part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a *mechanical invention made for the sole purpose* of performing tunes mechanically upon a musical instrument" (at p. 12) (italics ours).

In holding, therefore, that a musical composition copyrighted under the 1891 Act then in force could not be infringed through the issuance of sound reproducing devices, Justice Day went on to say:

"* * * When we turn to the consideration of the act it seems evident that Congress has dealt with

the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and whenever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original * * * (p. 16).

“*What is meant by a copy?* We have already referred to the common understanding of it as a reproduction or duplication of a thing. A definition was given by Bailey, J., in *West v. Francis*, 5 B. & A. 743, quoted with approval in *Boosey v. Whight*, *supra*. He said: ‘A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.’

“Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be ‘a written or printed record of it in intelligible notation’. It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. *In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term is generally understood*, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. *It is not susceptible of being copied until it has been put in a form which others can see and read* * * *” (italics ours) (p. 17).

Since the Copyright Act then in force (Act of 1891) like the prior Acts (*see Copyright Enactments, Copyright Office Bulletin No. 3*) gave no protection against mechanical reproduction but did provide protection against "publishing" and "copying"*, the result of that decision was to sanction the manufacture and sale of mechanical reproductions without the consent of the copyright owner on the theory that such recordings were neither a copy nor a publication of the copyrighted musical work. It would seem obvious that the dicta of the several cases we have discussed which hold that phonograph record sales constitute a "publication" and that copyright is forfeited when phonograph records are sold prior to registration, represent a conceptual departure from the theory of the *White-Smith* case.

Such a forfeiture would have been repugnant and antithetical to the concept of copyright since even under common-law copyright the exercise of such mechanical rights not only worked no such forfeiture but was indeed vouchsafed to the copyright owner. Thus in discussing mechanical protection for aliens under the present 1909 Copyright Act in *Leibowitz v. Columbia Graphophone Co.*, 298 Fed. 342 (S. D. N. Y. 1923) Judge Learned Hand stated (p. 343):

"It is always unsafe to attribute a given intent to Congress, yet it may be that, as respects such copyrights, the benefits of the statute were extended to domiciled aliens only on condition of their reproducing copies for sale. Since it is publication which at common law defeats an author's common-law literary rights, it is conceivable that it was thought proper to leave domiciled aliens, who would not publish, to

* The author * * * of any * * * musical composition * * * and the executors, administrators, or assigns of any such person shall * * * have the sole liberty of printing, reprinting, publishing * * * copying * * * and vending the same * * *" Sec. 4952 of Revised Statutes as amended by Act of March 3, 1891.

such common-law rights. They are not necessarily without relief, although they can not proceed under the statute.”

See, also:

George v. Victor Talking Machine Co., 38 U. S. P. Q. 222 (D. Ct. N. J. 1938) (not officially reported), reversed on other grounds, 105 F. 2d 679 (3rd Cir. 1939), cert. den. 308 U. S. 611 (1939);

Monckton v. Gramophone Co. (1912), 106 L. T. 84, 85.

The grant of mechanical rights to the statutory copyright owner was first made in the present Act, Section 1(e), which, as previously noted, similarly assimilates publication to “copies”, Section 26. See also Sections 10 and 13. This was the view, *semble*, of Justice Hughes in *Ferris v. Frohman*, *supra* (1912) where the plaintiff’s play, of which copies had not been printed or offered for sale, had been previously performed on the stage in London. Rejecting the defendant’s contention that such performance constituted a publication (by virtue of the then British Copyright Act) Justice Hughes stated:

“The present case is not one in which the owner of a play has *printed and published* it and thus, having lost his rights at common law, must depend upon statutory copyright in this country. The play in question has not been *printed and published* * * * ” (p. 434).

“The public representation of a dramatic composition, *not printed and published*, does not deprive the owner of his common law right, save by operation of statute * * * ” (p. 435). (Italics ours.)

Two years later, Judge Ward stated, in *Universal Film Mfg. Co. v. Copperman*, 218 Fed. 577 (2d Cir. 1914), *aff’g* 212 Fed. 301 (S. D. N. Y. 1914), cert. den. 235 U. S. 704 (1914), that in the analogous situation involving a motion picture photoplay (being “a performance of the scenario

* * * of a play”), the sale of positive prints was only for exhibition purposes and conferred merely a performing right to the photoplay “entirely consistent with the * * * common-law property in the play itself” (p. 579) and that “Sale of positive films after copyright was as consistent with its statutory ownership as was the sale of films before copyright with its common-law ownership” (p. 580).

This was evidently the view, too, of Judge Learned Hand in the above quotation from *Liebowitz v. Columbia Graphophone Co.*, *supra*.

More recently it has been squarely held that an “unpublished” musical work registered for copyright under Section 12 of the Act does not lose its copyright protection by virtue of the sale of phonograph records, *i.e.*, that such sale of phonograph records is not a publication vitiating copyright protection for the work as an “unpublished” work, *Yacoubian v. Carroll*, 74 U. S. P. Q. 257 (S. D. Cal. 1947—not officially reported).

The decision below and the dicta of the *Shapiro-Bernstein* and *Mills Music* cases thus not only depart from the doctrine and explicit decision of the *White-Smith* case to which the Courts have consistently adhered in copyright matters,* but also are contrary to the general tendency of

* Of the four “American Copyright Experts” who as official American delegates attended and participated at Geneva in September, 1952, in the drafting and adoption of the Universal Copyright Convention, the two who have written on this question state that the prevailing American view is that the sale of records is not a publication of the musical work involved. This accords with the convention provision (Article VI).

Arthur E. Farmer: Report to Section of Patent, Trade-Mark and Copyright Law of American Bar Association, at p. 11 (Sept. 15, 1952);

John Shulman: “A Realistic Treaty”, *The American Writer*, Vol. 1, No. 2 (Nov. 1952) 18, at p. 23.

This convention was ratified by the U. S. Senate on June 25, 1954 and on November 5, 1954 President Eisenhower executed the instrument of ratification.

the Courts as stated in *Baron v. Leo Feist, Inc.*, 78 F. Supp. 686 (S. D. N. Y. 1948); aff'd 173 F. 2d 288 (2d Cir. 1949):

“ * * * The courts, in their interpretations of the requirements of the Copyright Act, have shown a tendency to deal liberally with those thought entitled to have its protection, in accordance with the broad purpose of that legislation, *Washingtonian Pub. Co. v. Pearson*, 1939, 306 U. S. 30, 59 S. Ct. 397, 83 L. Ed. 470; *United States v. Backer*, 2 Cir., 1943, 134 F. 2d 533; *Campbell v. Wireback*, 4 Cir., 1920, 269 F. 372; *Patterson v. J. S. Oglivie Pub. Co.*, C. C. S. D. N. Y., 1902, 119 F. 451” (at p. 692).

POINT FOUR

Appellee's failure to furnish to the appellants the essential report and pay the royalties with respect to appellee's manufacture and sale of the phonograph records "You Can't Be True", even after the filing of the notice of use of the new work by appellant Biltmore, pursuant to Section 1(e) 17 U. S. C., subjects the appellee in any event to the penalties provided by the Copyright Law.

The District Court below held that the basic work was not protectable against defendant's infringement because of the German manufacture and sale of phonograph records and that the new work was not protected against infringement of the new arrangement because of the failure, respectively, of the copyright proprietor of the basic work and the infringing composer of the new arrangement to file a notice of use under Section 1(e) of the Copyright Act (84, Conclusions 3 and 85, Conclusion 5).

Even if we assume (without conceding) such ruling correct as to the effect of the German recording the District

Court still completely overlooked the fact that the greatest portion of the infringing records manufactured by the defendant were manufactured and sold after the filing of a 1(e) notice of use by the appellant Biltmore. This notice would undoubtedly be sufficient as a notice for the basic work as well, since Section 1(e) gives the right to a compulsory license only with respect to a *similar* use. In the instant case, since the only use which was authorized was of the new work, no separate notice of use was required for the basic work.

The specific question involved is whether the requirement of the statute

“It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright, * * * ”

entails in any way a forfeiture of rights. The Court below held that it does because, notwithstanding the filing of the notice under 1(e), no recovery was granted even as to phonograph records manufactured after the filing of the notice of use.

Such holding is contrary to the theory applied by the Supreme Court in *The Washingtonian Publishing Co., Inc. v. Pearson*, 306 U. S. 30 (1939). In that case the question arose as to whether rights were lost by the copyright owner for failure to make a prompt deposit of copies and application for registration of a published work. The infringer claimed that failure to make prompt deposit as required by Section 12 (the time lapse between publication and deposit in that case was 14 months and the copies were deposited for registration after the actual infringement was committed by the defendant) invalidated the copyright.

The Court held the defense bad. The Supreme Court view is that unless the Copyright Act is precise as to filing time requirements and as to the effect of non-filing within a precisely stipulated time, a loss of rights will not result.

“while no action can be maintained before copies are actually deposited, mere delay will not destroy the right to sue. Such forfeitures are never to be inferred from doubtful language” (p. 42).

In the instant case although the section is phrased somewhat differently there is no doubt that as in the case of deposit of published copies for the purpose of copyright registration, the filing of the notice must occur after the actual licensing or use for mechanical recordation purposes.

There is no requirement that the notice of use be filed prior to the licensing or use and since the filing must be done afterward, the question is, how soon afterward in order to preserve the copyright proprietor's rights with respect to mechanical reproduction? Since the purpose of the filing requirement is to give notice so that others may take advantage of the compulsory license provisions, a logical interpretation would be that after the initial mechanical use and until the filing of such notice the mechanical rights are not enforceable but suspended against all recordings.

Thus, one of the foremost authorities on American Copyright Law, Weil on *Copyright Law* (p. 97) states, “No time is provided for filing the notice, so that, apparently, it may be filed at any time before suit.” Thus, once the notice is filed, the suspended mechanical right will in any event be enforced as to records manufactured thereafter. This would also follow from the theory that each infringing act constitutes a separate infringement.

That the penalty portions of Section 1(e) applicable to a failure to file the required notice is to be limited rather than extended in its operation is indicated by the case of *F. A. Mills Inc. v. Standard Music Roll Co.*, 223 Fed. 849

(D. C. N. J. 1915) aff'd 241 Fed. 360 (3rd Cir. 1915). In that case a defense of failure to file the notice of use under Section 1(e) was interposed in an action which claimed infringement by reason of the printing of lyrics. The Court held that the statutory proviso that the failure to file the notice of user should constitute a defense to any infringement was to be limited to any infringement by mechanical reproduction, and hence the defense was invalid.

The restriction of the application of this statutory penalty is further indicated, in addition to the statement in the case of *The Washingtonian Publishing Co. Inc. v. Pearson, supra*, by provisions of other sections of the Copyright Act where, when forfeiture is intended, specific provision therefor is made. Thus Section 21, in handling the question of absence of copyright notice, refers to "invalidate the copyright or prevent recovery". Likewise, Section 24 specifically provides that in default of application for renewal and extension "the copyright in any work shall determine at the expiration of 28 years from first publication". Likewise, Section 30 requires the recordation of assignments of copyright providing "in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration * * *".

Any interpretation of the penalty provision of Section 1(e) for failure to file a notice of use other than one which gives only previous infringers a defense pending compliance by the copyright owner would constitute an unprecedented forfeiture for the benefit of an outright infringer. As Judge Learned Hand of the Second Circuit Court of Appeals has recently said:

"* * * We are unwilling to allow a barefaced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public." *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F. 2d 594, 603 (2d Cir. 1951).

POINT FIVE

Appellee is liable individually although the phonograph records were manufactured and sold by a corporation which he managed and controlled.

In his argument below the appellee claimed immunity from liability because the phonograph records were actually manufactured and sold by a corporation known as "Chicago Recording Studios Inc." The agreed statement of facts states that he was "the President and General Manager of" the corporation (41) which he managed and controlled (42) and that he "arranged for the recording, release, and sale of all phonograph records issued by Chicago" (41). Between October 1, 1947 and September 1, 1953, Chicago, under the management and control of Kittinger, sold 207,000 phonograph records of the new arrangement (42).

In the district court, appellee argued that he was insulated from liability by reason of the corporate structure and cited the case of *Edward B. Marks Music Corporation v. Foullon*, in the district court for the Southern District of N. Y., 79 F. Supp. 664 (1948). In affirming the judgment in that case the Court of Appeals for the Second Circuit, 171 F. 2d 905 (1949), said:

"Like any other officer, director, or shareholder of a company, Foullon is not liable on the 'License', a contract of United Masters" (at p. 908).

It is clear that the Court of Appeals' view was that the officer, director or employee would not be liable if it was a contract liability; obviously it would be otherwise if the liability sought to be imposed was based on a tort.

Where they individually participate in the acts constituting the infringement, directors, officers and stockholders of a corporation are guilty of a tort and personally liable.

- Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F. 2d 809 (7 Cir. 1942), (president of corporation);
- Pathe Exchange Inc. v. International Alliance*, 3 F. Supp. 63 (S. D. N. Y. 1932) (president of corporation);
- Falk v. Curtis Publishing Co.*, 98 Fed. 989 (E. D. Pa. 1900) (corporate agent);
- Conde Nast Publications Inc. v. Vogue School*, 105 F. Supp. 325 (S. D. N. Y., 1952) (director and sole stockholder);
- Associated Music Publishers Inc. v. Debs Memorial Radio Fund, Inc.*, 141 F. 2d 852 (2 Cir. 1944), aff'g, 46 F. Supp. 829 (S. D. N. Y. 1942) cert. den. 323 U. S. 766 (employee manager);
- Towle v. Ross*, 32 F. Supp. 125 (D. Oreg. 1940) (government employee);
- Leon v. Pacific Tel. & Tel. Co.*, 91 F. 2d 484 (9th Cir. 1937) (employee wife).

See also:

- De Acosta v. Brown*, 146 F. 2d 408 (2d Cir. 1944), cert. den. 325 U. S. 862;
- Stuart v. Smith*, 68 Fed. 189 (S. D. N. Y. 1895);
- Harper v. Shoppell*, 28 Fed. 613 (S. D. N. Y. 1886);
- Altman v. New Haven Union Co.*, 254 Fed. 113 (D. Conn. 1918);
- Kalem Co. v. Harper Bros.*, 222 U. S. 55 (1911).

POINT SIX

Judgment should be reversed with appropriate instructions for judgment for appellants for an accounting of profits and for damages.

Dated: July 11, 1955.

Respectfully submitted,

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No. 14625

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BILTMORE MUSIC CORPORATION and HERBERT BROWNELL,
JR., Attorney General of the United States, as Suc-
cessor to the Alien Property Custodian,

Appellants,

vs.

ROBERT W. KITTINGER,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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BRIEF FOR APPELLEE.

Jurisdictional Statement.

This appeal by plaintiffs-appellants is from a final judgment of the United States District Court for the Southern District of California, Central Division, dismissing on the merits plaintiffs-appellants complaint for infringement of two United States statutory copyrights. The cause of action in the complaint arose under the Copyright Law of the United States (17 United States Code, Secs. 1 to 215 incl.) and the Trading with the Enemy Act (50 United States Code, Appx. Sec. 17) and jurisdiction is based upon Section 1331 of Title 28 of the United States Code as Amended. Judgment of said District Court being final, this Court has jurisdiction under 28 United States Code, Section 1291.

Statement of the Case.

The case was tried on an agreed statement of facts [Tr. pp. 39-49]. The facts stipulated to by the parties are summarized as follows:

Prior to January 1, 1935, Gerhard Ebeler and Hans Otten, two German Nationals composed a musical composition entitled "Du Kannst Nicht Treu Sein" (You Can't Be True), referred to as the "composition" in the agreed statement of facts, and as the "basic work" in appellants' brief. During the year 1935 Ebeler and Otten assigned all rights to the composition to one Verlag, another German National, who made application for and was granted a United States copyright under Registration E For. No. 39841.

Between 1935 and 1938, Verlag, the then copyright owner, licensed a German firm to record said composition and make phonograph records of same, which was done. During 1938 phonograph records of the composition were sold in the United States. On February 24, 1948, all rights, privileges and powers in connection with Copyright E For. No. 39841 were seized by the Alien Property Custodian and title thereto subsequently transferred to the Attorney General of the United States.

During the period between January 1, 1947 and January 1, 1949, appellee acted as President and General Manager of Chicago Recording Studios, Inc., an Illinois corporation, hereinafter referred as "Chicago" which was engaged in the manufacture and sale of phonograph records.

Shortly prior to August 20, 1947, Ken Griffin, a musician, offered to record some new arrangements he had devised for Chicago. Chicago accepted Griffin's offer,

and on or about August 20, 1947, Griffin recorded eight master records for Chicago, for which he was paid the current union scale. A master record is a recording that is used as the basis for making phonograph records of the material recorded thereon. One of the masters was an organ solo of a new arrangement of the composition "Du Kannst Nicht Treu Sein."

On October 1947, Chicago issued phonograph records of the new arrangement under the title, "You Can't Be True." Subsequently Chicago manufactured 207,000 of these records, all of which were replicas of the Ken Griffin recording.

One J. F. Bard, after hearing the Chicago phonograph record, "You Can't Be True," collaborated with one Dave Dreyer who had not heard the record, in composing English lyrics for the new arrangement. On February 17, 1948, J. F. Bard obtained a written instrument executed by Ken Griffin that is alleged to be an assignment of the music of the new arrangement to Bard.

On March 2, 1948, J. F. Bard Company, Inc. was granted a license, E 1277, by the Office of Alien Property to publish sheet music and issue phonograph records of the composition in the form of a new arrangement and with the new lyrics.

On March 8, 1948, appellant Biltmore Music Corporation was incorporated under the laws of the State of New York. On March 12, 1948 Dave Dreyer was elected President and J. F. Bard was elected Vice President of said corporation.

On March 15, 1948 appellant Biltmore Music Corporation deposited two copies of sheet music in the Copyright Office, which sheet music contained the music of the new

arrangement as Ken Griffin had recorded it for Chicago, together with said English lyrics composed by Dave Dreyer and J. F. Bard.

On April 9, 1948 appellant Biltmore Music Corporation was granted copyright registration E Pub. No. 24797 on the new arrangement and English lyrics. Appellant Biltmore Music Corporation on March 9, 1948 filed a Notice of Use in the United States Copyright Office.

Appellant Biltmore Music Corporation on March 16, 1948 wired appellee to stop pressing records of "You Can't Be True" as records infringed copyright controlled by Biltmore.

Chicago Recording Studios, Inc., after this notice attempted to obtain license from the Office of Alien Property under Copyright E For. No. 39841 but was refused.

Between March 18, 1948 and November 9, 1948, appellant Biltmore licensed eighteen phonograph record companies under Copyright E Pub. No. 24797.

At no time was a Notice of Use under 17 U. S. C. Section 1(3) filed in the Copyright Office by Ken Griffin on his new arrangement.

At no time was a Notice of Use under 17 U. S. C. Section 1(e) filed in the Copyright Office by the Office of Alien Property, Attorney General of the United States, or any other owner of the copyright on the composition, "Du Kannst Nicht Treu Sein."

The Questions Involved.

1. Did failure of the foreign owners of the United States copyright on the composition, as well as the Office of Alien Property, to file notice of the intention to mechanically reproduce the composition, preclude appellants from recovering the statutory royalty as provided for in 17 U. S. C. Section 1(e) from appellee for records of said composition sold my him?

2. Can appellants recover statutory royalties from appellee for sale of records of the new arrangement when Chicago Recording Studios, Inc. had:

- (a) Paid Ken Griffin a valuable consideration to record a master of the new arrangement, which master was used as a basis for the reproduction of the alleged infringing records?
- (b) The alleged infringing record sold by appellee had been manufactured by Chicago Recording Studios, Inc. and played extensively in public for at least six months before appellant Biltmore Music Corporation secured copyright E Pub. No. 24797 thereon.

Summary of Argument.

I. Failure of owners of United States copyright on the composition "Du Kannst Nicht Treu Sein" to comply with the provisions of 17 U. S. C. Section 1(e) prevents appellants from collecting the statutory royalties from appellee or other persons who may mechanically reproduce said composition.

II. Ken Griffin, due to failure on the part of the owners of the United States copyright on the composition to comply with provisions of 17 U. S. C. Section 1(e), did not require their permission to devise and record the new arrangement.

III. Ken Griffin was the composer of the new arrangement and had a property right therein under which he could grant licenses and which property right he could assign.

IV. The copyright on the new arrangement obtained by appellant Biltmore was invalid, inasmuch as it had been published by widespread public playing thereof prior to the Biltmore Music Corporation application for copyright protection on the Dreyer-Bard arrangement.

V. No appealable error has been brought before the Court by appellants.

VI. The judgment should be affirmed.

The Controlling Statutory Law Here Involved.

The Copyright Law (Title 17, United States Code) upon which this action is brought, was passed in 1909 and it repealed and superseded all prior copyright laws. This case must be decided in accordance with the specific provisions of the Copyright Act, 17 U. S. C., Sections 1-215, which clearly states:

“1. EXCLUSIVE RIGHTS AS TO COPYRIGHTED WORKS.—Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

“(a) To print, reprint, publish, copy, and vend the copyrighted work;

“(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for art;

* * * * *

“(e) To perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, and for the purposes set forth in subsection (a) hereof to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced: *Provided*, That the provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions published and copyrighted after July 1, 1909, and shall

not include the works of a foreign author or compose unless the foreign state or nation of which such author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights. * * * It shall be the duty of the copyright owner, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the copyright office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright.

“In case of failure of such manufacturer to pay to the copyright proprietor within thirty days after demand in writing the full sum of royalties due at said rate at the date of such demand, the court may award taxable costs to the plaintiff and a reasonable counsel fee, and the court may, in its discretion, enter judgment therein for any sum in addition over the amount found to be due as royalty in accordance with the terms of this title, not exceeding three times such amount.

“2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

* * * * *

“9. AUTHORS OR PROPRIETORS, ENTITLED; ALIENS.—The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms

specified in this title: *Provided, however,* That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:

“(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

“(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

* * * * *

“11. REGISTRATION OF CLAIM AND ISSUANCE OF CERTIFICATE.—Such person may obtain registration of his claim to copyright by complying with the provisions of this title, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title.

“12. WORKS NOT REPRODUCED FOR SALE.—Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay;”

POINT ONE (1).

Failure of Owners of the United States Copyright on the Composition, "Du Kannst Nicht Treu Sein" to Comply With the Provisions of 17 U.S.C. Section 1(e) Prevents Appellants From Collecting Statutory Royalties From Appellee or Others Who May Have Mechanically Reproduced Said Composition.

Appellants have argued at length in Point One, pages 10-18 of their opening brief that neither the Attorney General nor his predecessors in title to the United States copyright on the composition were required to comply with provisions of 17 U. S. C., Section 1(e) as a condition precedent to collecting the statutory royalties for mechanical reproduction of the composition.

In support of their position, appellants have cited numerous United States and foreign cases, various foreign proclamations, as well as excerpts from leading text books. Unfortunately, this cited material is completely irrelevant to the question at hand, but is instead directed to and concerned with the extraterritorial effect of a copyright.

In their desire to establish that neither the Attorney General nor his predecessors in title are obligated to comply with 17 U. S. C., Section 1(e) as a condition precedent to collecting statutory royalties, appellants have overlooked the following basic facts.

The most basic fact is that the provisions of the Copyright Act of 1909 are statutory. Therefore, in order to obtain the benefits of the Act, the provisions of the Act must be strictly complied with.

In *Calega v. Inter-Ocean Newspaper Company* (1909), 215 U. S. 188, the Supreme Court stated,

“Statutory copyright is not to be confounded with the common law right, as at common law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner’s common law right was lost. At common law an author had a property in his manuscript, and might have an action against any one who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. *This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out.*”

The rights of a copyright owner of a musical composition under the Copyright Act are clearly summarized in *Shilkret v. Musicraft Records, Inc.* (C.C.A. 2), 55 U. S. P. Q. 471, wherein it was held,

“By complying with section 11 an author gets the statutory rights specified in section (1) and among them, in the case of a musical composition, the right of mechanical recording and reproduction under clause (e). It is an established rule of statutory construction that a proviso states an exception from the general policy which a law embodies, and should be strictly construed and so interpreted as not to destroy the remedial processes intended to be accomplished by the enactment *Spokane & Inland R. R. v. United States*, 19 Wall. 227, 336.”

The rights granted under 17 U. S. C., Section 1(e) relative to mechanically reproducing musical compositions registered under the Act are given to all composers who

are United States citizens, but are granted to only those foreign composers who are citizens of countries which by treaty, convention, agreement or law grant similar rights to United States citizens.

Under the provisions of 17 U. S. C., Section 1(e) certain foreign composers can qualify to obtain the same rights as a United States citizen and composer. However, at the most, the foreign composer obtains rights equal to those granted a United States composer.

A United States citizen who is the owner of a United States copyright on a musical composition has a duty, if he wishes to avail himself of the provisions of the Copyright Act relative to collecting statutory royalties for mechanical reproduction of the composition, which duty is that he must file a notice of use in the Copyright Office if he mechanically reproduces the composition or licenses others so to do. Section 1(e) provides that failure to file such notice shall be a complete defense to any suit, action or proceeding for any infringement of such copyright.

In framing the provisions of the Copyright Act Congress wisely did not geographically limit the country in which the first mechanical reproduction could take place. Had the Act been so limited, the provisions thereof as to statutory royalties derived from United States copyrights could have been easily circumvented by either American citizens or foreign citizens by licensing the mechanical reproduction of copyrighted compositions in foreign countries, and then having phonograph records of the recorded compositions shipped to the United States for sale therein.

At the time Verlag filed for and obtained his United States copyright on the composition he was entitled so to

do, for at that time Germany granted similar rights to United States citizens. Verlag then had the same rights under the Copyright Act relative to the composition as though he were a United States citizen. However, Verlag had the same duty under the Copyright Act as a United States citizen if he wished to collect statutory royalties for mechanical reproduction of the composition in the United States. The duty Verlag was obligated to perform was the same as that required of a United States citizen, which was to file a notice of use when he first mechanically reproduced or licensed others to mechanically reproduce his composition.

Verlag failed to perform this duty, and accordingly all rights under the Copyright Act to recover statutory royalties on mechanical reproduction of the composition within the territorial limits of the United States were lost. When the copyright on the composition was acquired by the Office of Alien Property it was subject to the defect that statutory royalties could not be recovered for the mechanical reproduction thereof within the territorial limits of the United States. The question as to whether statutory royalties can be recovered for the mechanical reproduction of the composition in the United States is in no way dependent upon whether the United States Copyright Act has any extra-territorial effect, but is dependent on the simple fact that Verlag, as a German citizen, was bound by the same duties as a United States citizen. The geographical location of his residence or where he licensed the mechanical reproduction of the composition is of no consequence.

It will be apparent that even if it could be held that the breach of duty on the part of Verlag did not result in forfeiture of the right to collect statutory royalties on

the composition, that the duty as defined in 17 U. S. C., Section 1(e) was breached a second time when the Office of Alien Property granted the license to J. F. Bard Company without filing a notice of use in the Copyright Office. This second breach of said duty would be sufficient to prevent appellants' recovery of statutory royalties from appellee.

POINT TWO (2).

Due to Failure on the Part of the Owners of the United States Copyright on the Composition to Comply With Provisions of 17 U. S. C., Section 1(e) Ken Griffin Was Relieved of the Necessity of Obtaining Their Permission to Devise and Record the New Arrangement.

As composer of the new arrangement, Ken Griffin had a property right therein, at least with regard to preventing others from performing the new arrangement without his permission. Normally Ken Griffin's recording of his new arrangement would have been an infringement of the copyright on the composition, but for reasons detailed hereinabove, the owners of the copyright on the composition had forfeited their right to collect royalties for the mechanical reproduction thereof.

Therefore, Ken Griffin as the owner of a property right in the new arrangement, could mechanically reproduce the new arrangement without infringing the copyright on the composition. The property right so secured by Ken Griffin did not arise under the Copyright Act, but is that inherent right possessed by all composers of being able to prevent the unauthorized performance of musical compositions composed by them.

POINT THREE (3).

Ken Griffin Was the Composer of the Arrangement and Had a Property Right Therein Under Which He Could Grant Licenses, Which Property Right He Could Assign.

As owner of a property right in the new arrangement, Ken Griffin not only could mechanically reproduce the new arrangement himself, but could license others so to do. For a valuable consideration Ken Griffin chose to record the new arrangement as a master for Chicago [Tr. pp. 41-42, Par. 9]. Subsequently, Chicago used said master for the only purpose to which it could be put [Tr. pp. 42-43, Par. 10], that of making phonograph records of the new arrangement.

By so recording the new arrangement for a valuable consideration, Ken Griffin granted Chicago a license to manufacture and sell phonograph records of the new arrangement. This license so granted to Chicago is a complete defense to the present action for infringement, as the assignment of the new arrangement by Griffin to J. F. Bard on February 17, 1948 was subject to the previously granted Chicago license. In *Piantadosi v. Loews' Incorporated, et al.* (C. C. A. 9), 59 U. S. P. Q. 176, Decided June 2, 1943, the court stated:

“The assignment to Feist, Inc., being proved, the publisher became at least a co-owner of the copyright, Section 42 of the Copyright Act. The question, then, is whether a third party licensed to use a copyrighted work by one co-owner incurs liability for infringing the copyright to other co-owners who gave no consent. A negative answer is given by dictum in *Klein v. Beach*, 232 F. 240, 247, affirmed without mentioning the point in 239 F. 108. Herbert

v. Fields, 152 N. Y. S. 487; Nillson v. Lawrence, 148 App. Div. 678, 133 N. Y. S. 293; Amdur Copyright Law and Practice, p. 834f, are in accord. Copyrights are similar in purpose to patents, and patent law protects a licensee of a joint owner from suit by another joint owner. Talbot v. Quaker State Oil Refining Co., 104 F. 2d 967 (41 U. S. P. Q.); Paulus v. M. M. Buck Mfg. Co., 129 F. 2d 594; Blackledge v. Weir & Craig Mfg. Co., 108 F. 71. It is reasonable that the principle covers copyrights. Therefore, Feist, Inc. and through it Loew's, received a valid license to use the song, a good defense to a suit by a co-owner Piantadosi."

That Ken Griffin had a property right (common law copyright) in the new arrangement under which he could grant a license, is not even argued by appellees, for on page 24 of their opening brief they state:

"Not only, therefore, was the prior recordation of the assignment unnecessary, but since Griffin conveyed common law rights only, his assignment would not even have had to be of a formal nature, or in writing, *Freudenthal v. Hebrew Pub. Co.*, 44 F. Supp. 754, at p. 755 (S. D. N. Y. 1942). See also, *Houghton Mifflin Co. v. Stackpole Sons, Inc.*, 104 F. 2d 306 (2d Cir. 1939), where the Court said:

"'Since Adolph Hitler did not himself take out the copyright there was no need for a formal assignment by him.'"

It is elementary that the property right Ken Griffin had in the new arrangement arose on the date he composed same, and that he could grant a license thereunder or assign same on any date thereafter, both of which acts were subsequently done.

POINT FOUR (4).

The Copyright on the New Arrangement Obtained By Appellant Biltmore Music Corporation Was Invalid Inasmuch as It Had Been Published Due to Widespread Public Playing Thereof Prior to the Date Biltmore Applied for Copyright Protection on the Dreyer-Bard Arrangement.

Copyright registration E Pub. No. 24797 granted to appellant Biltmore Music Corporation covered a musical composition that comprised English lyrics composed by Dave Dreyer and J. F. Bard and music which was the new arrangement composed by Ken Griffin. On March 15, 1948 appellant Biltmore Music Corporation filed application for a copyright [Tr. p. 46, Par. 21] which resulted in the issuance of copyright E Pub. No. 24797. It should be particularly noted that this application for statutory copyright protection on the new arrangement was filed six months after the first phonograph records of the new arrangement were publicly released by Chicago, and that during this six-month period at least 4,000 records of the new arrangement were sold to the public by Chicago [Tr. pp. 42-43, Par. 10].

Appellee contends that as a result of the wide-spread sale of phonograph records of the new arrangement during said six-month period, publication of the new arrangement occurred, and the Biltmore copyright E Pub. No. 24797 is invalid as a result thereof.

Appellee's contention relative to the widespread public use and sale of phonograph records constituting a publication being sufficient to invalidate a subsequently secured statutory copyright is supported by several District Court decisions. In *Shapiro, Bernstein & Co., Inc. v. Miracle*

Record Company, Inc. (D. C. N. D., Ill.), 86 U. S. P. Q. 193, 194, the court stated:

“It seems to me that publication is a practical question and does not rest on any technical definition of the word ‘copy’. * * * When phonograph records of a musical composition are available for purchase in every city, town and hamlet, certainly the dissemination of the composition to the public is complete, and is as complete as by sale of a sheet music reproduction of the composition. The Copyright Act grants a monopoly only under limited conditions. If plaintiff’s argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act. * * * It is my opinion that when Lewis permitted his composition to be produced on phonograph records and permitted these records to be sold to the general public, the common law property in the musical composition did not survive the sale of the phonograph records, and the public sale of those records was a dedication of the musical composition to the public.”

In *Mills Music, Inc. v. Cromwell Music, Inc.*, (D. C. S. D., N. Y.), 103 U. S. P. Q. 84 at page 95, Judge Liebell in an extensive opinion stated,

“The manufacture and sale of phonograph records in this country by a person or corporation duly authorized by Miron would have constituted a publication of his composition. I believe that it would be a publication, capable of destroying his common law copyright. If he had obtained a statutory copyright prior to the manufacture and sale of the phonograph records, the sale of the records would have no effect on Miron’s rights, which then would be based on the copyright statute. The weight of legal authority seems to support that view. (R.C.A. Mfg. Co. v.

Whiteman, 114 F. 2d 86, 46 U. S. P. Q. 324; Shapiro Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473, 86 U. S. P. Q. 193.) But there was no such authorized manufacture and sale of records of 'Tzena' prior to Miron's agreement with and assignment to plaintiff through Miron's agent Olshansky."

The question as to whether widespread sale of phonograph records can invalidate a subsequently obtained statutory copyright is indeed a practical one. If such sales do not invalidate a subsequently obtained statutory copyright, a means is provided that permits the statutory licensing feature of the Copyright Act to be completely circumvented.

Circumvention of this feature of the Act can be easily achieved by a composer in licensing the mechanical reproduction of his composition on which no application for statutory copyright protection is made. By so doing the composer enjoys a common law copyright on the composition which can be of perpetual duration. A composer acting in the above-described manner operates under the distinct advantage that he alone or his licensee is the only one who can mechanically reproduce his composition, and as a result, eliminates all competition in the phonograph record field.

The only real disadvantage suffered by a composer acting in this manner is that he cannot print sheet music or orchestrations of his composition without recourse to the protection offered by the Copyright Act. However, the remuneration derived from the sale of sheet music and orchestrations is normally small in comparison to the dollar volume sale of phonograph records. Therefore, if widespread circumvention of the compulsory licensing feature

of the Copyright Act is to be avoided, it is essential that this Court approve the ruling of Judge Igoe in the case of *Shapiro, Bernstein & Co., Inc. v. Miracle Record Co.*, 86 U. S. U. Q. 193, 194.

That publication can occur without recourse to sheet music, orchestrations, and other printed material is aptly demonstrated by the recent song success, "Davy Crockett." Due to the widespread public playing of this composition on phonograph records, as well as through the media of radio and television, hardly a child exists throughout the United States who cannot sing or hum the "Davy Crockett" score as well as recite a good portion of the lyrics thereof. Legally to say that there can be no publication of a musical composition by the playing of phonograph records thereof is to simply disregard the actual facts.

In the present instance, widespread sale of phonograph records of the new arrangement did occur prior to application for statutory copyright thereon, and to such extent that the statutory copyright secured by appellant Biltmore is invalid.

POINT FIVE (5).

No appealable error has been brought before the Court by appellants. The mere fact that the losing party is unhappy with the judgment of a Trial Court (as is always the case) does not require the Appellate Court to retry the case. Defendants must first show an appealable error. Here, appellants have failed to do so.

"It is the appellant's duty to bring up a record that discloses error. Every intendment should be in favor of the lower court's judgment." (*Hardt v. Kirkpatrick*, 91 F. 2d 875, 878 (C. A. 9, 1938)).

“The burden of showing grounds on which a judgment should be reversed rests on the appellant, *Elias v. Clarke*, 2 Cir., 143 F. 2d 640, certiorari denied, 323 U. S. 778, 65 S. Ct. 191, 89 L. Ed. 622.

“A federal court of appeals must assume that the judgment of a federal district court appealed from is a legally correct adjudication of the controversy. (*Chicago Great Western Ry. Co. v. Beecher*, 8 Cir., 150 F. 2d 394, 399, certiorari denied, 326 U. S. 781, 66 S. Ct. 339, 90 L. Ed. 473.” (*Danaher v. United States*, 184 F. 2d 673, 675 (C. A. 8, 1950).)

Appellants have not challenged a single finding of fact, and the judgment is squarely supported by the findings. No error is disclosed by the record properly before this Court, and the judgment must therefore be affirmed.

POINT SIX (6).

The judgment should be affirmed.

Appellants had the burden of convincingly showing that the Trial Court committed a reversible error. They have failed to point to a single appealable error in the record. The judgment of the Trial Court should accordingly be affirmed.

Respectfully submitted,

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No. 14625.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BILTMORE MUSIC CORPORATION and HERBERT BROWNELL,
JR., Attorney General of the United States, as Successor
to the Alien Property Custodian,

Appellants,

vs.

ROBERT W. KITTINGER,

Appellee.

Appeal From the United States District Court, Southern
District of California, Central Division.

APPELLANT'S REPLY BRIEF.

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AUG 20 1955

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No. 14625.

IN THE

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Appellants,

vs.

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Appellee.

Appeal From the United States District Court, Southern
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APPELLANT'S REPLY BRIEF.

Preliminary to a discussion of appellee's points, it should be noted that in two respects its statement of facts, in making categorical assertions, omits vital qualifying facts. He states (at p. 2) that phonograph records of the composition were sold in the United States in 1938, but fails to mention that such sales were made by one having no license or permission from the copyright owner, who was in fact never notified of their manufacture or sale (pp. 40-41).

Similarly, in stating no notice of use had been filed by Ken Griffith on his new arrangement, he fails to mention that a notice of use was filed by Biltmore for the new work, which includes the new arrangement (p. 46), and which was the only authorized mechanical use in this country.

Reply to Appellee's Point One (1).

Appellee argues (p. 12), in support of its interpretation, the possibility otherwise of circumventing Section 1(e) by manufacture of records in a foreign country and shipping them here for sale. The simple answer to this is that if the copyright owner has not authorized such importation, he should not suffer any penalty as a result. The precise question was involved, and so decided, in

Heim v. Universal Pictures Co., 154 F. 2d 480
(C. C. A. 2d 1946);

Mills Music, Inc. v. Cromwell Music, Inc., 126 Fed.
Supp. 54 (S. D. N. Y., 1954).

In the *Heim* case sheet music printed in Hungary without a proper copyright notice had been imported and sold in the United States. The Court of Appeals rejected the argument that copyright was forfeited as a result, saying:

“The imported copies sold in this country were not shown to have been authorized by the proprietor.” (p. 486.)

If the importation and sale had been authorized, the copyright might have been invalidated by the error in the notice (p. 487).

In the *Mills Music* case phonograph records had been authorized in Israel, but imported into this country. Finding the importation unauthorized, the court held that the sale of the records here did not have the effect of forfeiture which an authorized sale would have had (pp. 69-70).

Of no greater validity is appellee's suggestion that foreigners would have greater privileges than citizens (p. 13); the statute, however interpreted, would apply to the place of exercise of the right, not the residence of the owner, and had the copyright owner been a citizen of this country and licensed the mechanical rights existing by virtue of German copyright, he would have no less rights under the American copyright law than the German citizen.

Similarly beside the point is appellee's off-hand suggestion (p. 14) that the Alien Property Custodian should have filed a notice of use when he made his agreement with the J. F. Bard Company.

In the first place, the statute does not require the filing of the notice upon the granting of a license; it requires the filing only upon the use of the work mechanically, whether it be by the copyright owner or by others with his permission or acquiescence. In any event the license involved here is not the act envisaged by section 1(e) as requiring the filing; it is more like the grant of owner-

ship rights where the grantee can exercise or permit others to exercise the rights thereunder.

In the second place, a notice of use was filed—by Biltmore, with respect to the new work. It is conceded that the copyright proprietor of the new work is Biltmore; hence it was the proper one to file.

Lastly, it would seem that Biltmore's filing was adequate compliance with the statute and should inure to the benefit of the proprietor of the basic work, which is included in the new work.

Reply to Point Three (3).

Ignoring our authorities to the effect that an infringing arranger has no protectible property or other right, appellee assumes (p. 15) that by rendering services as a performing artist the infringer has granted a license to use the arrangement. In support he cites only the *Piantodosi* case which has to do with rights of co-owners to license without the consent of the others. Appellee overlooks the necessity of first showing some right in Griffin, and then showing that he purported to license the use, contrary to industry custom or the terms of his union form of contract for services rendered (pp. 42, 52), not for grant of any rights.

Appellee further mis-states appellant's position (p. 16) where he implies that Griffin's property rights are not questioned by Appellant's Opening Brief. Point Two of that brief (p. 18) is devoted to the proposition that the infringing arranger, Griffin, acquired no rights in the arrangement.

Reply to Point Four (4).

Appellee's discussion confuses common law and statutory rights. The former are perpetual in duration; the latter in their creation are limited in time. One may elect not to accept the benefits of statutory copyright and restrict his exercise of his common law rights to those which do not dedicate the work to the public domain.

The fact that the manufacture of records is remunerative does not mean that the exercise of such right forfeits ownership; the exercise of the public performance right, which is, within judicial notice, even more remunerative than the mechanical recordation right, does not (See App. Op. Br. p. 28 *et seq.*) Logic requires that the former have the same consequences as the latter.

Conclusion.

Throughout appellee's brief there is a misconception of the relief which appellants seek in this action. He states, again and again, that the question is whether appellant may recover "statutory royalty" or "royalties" (see, *e. g.* pp. 5-6, 10, 13-14 *et seq.*).

Since the appellee deliberately, and after notice and opportunity to obtain a license to mechanically reproduce, proceeded to manufacture his records without a license and without complying with the statutory provisions which would have entitled him to a compulsory statutory license, he is an infringer. As such, his liability is not limited to the "statutory royalty"; appellant may recover his damages, or appellee's profits, or in lieu thereof the amounts, computed by multiplying the statutory 2¢ royalty as provided in section 1(e) and in section 101(e).

As the question of damage had not been passed upon below, we had assumed that a reversal of the judgment would remit to the district court this computation of the amounts recoverable.

The judgment should be reversed.

Dated: August 18, 1955.

Respectfully submitted,

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No. 14627

**United States
Court of Appeals**
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.
AMOS R. MORIN,
Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Oregon**

FILED

APR 11 1955

No. 14627

United States
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UNITED STATES OF AMERICA,
Appellant,
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AMOS R. MORIN,
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Transcript of Record

Appeal from the United States District Court for the
District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

No. 7260—Civil

AMOS R. MORIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff and for his cause of action complains and alleges as follows:

I.

That this action arises under Title 28, United States Code, Section 1346(b), as hereinafter more fully appears.

II.

That plaintiff resides in the City of Portland, State of Oregon, in the District of Oregon.

III.

That the tort claim for which plaintiff sues herein arises from the acts and omissions hereinafter alleged which occurred at the City of Portland, State of Oregon, in the District of Oregon.

IV.

That at all times herein mentioned the Public Health Service was and now is a service in the Fed-

eral Security Agency of the United States of America.

V.

That at all times hereinmentioned plaintiff was by reason of his employment as a civilian by the United States Army as a Seaman, entitled to receive medical care from the said United States Public Health Service.

VI.

That on or about the 10th day of June, 1952, plaintiff was injured in an accident not connected with his employment, and received among other injuries a compound fracture of the tibia and laceration of the shin.

VII.

That thereafter on the said 10th day of June, 1952, on or about 1:45 o'clock in the afternoon of said day plaintiff was received into the Physicians and Surgeons Hospital located in Portland, Oregon, and remained there on the 10th, 11th, and the forenoon of the 12th day of June, 1952, said hospital being designated by the said Public Health Service as the station of the service for hospital treatment in the City of Portland, Oregon.

VIII.

That at said time and place the defendant through its agents, servants and employees acting as physicians of the said Public Health Service entered upon and assumed the relationship of physician to the plaintiff herein as patient and pursuant to said relationship examined plaintiff and undertook to

treat and care for plaintiff and impliedly agreed to exercise and use a reasonable degree of professional skill and diligence in the diagnoses, care and treatment of plaintiff.

IX.

That at the time and place at which defendant undertook to diagnose, treat, and care for plaintiff as aforesaid, plaintiff was suffering from the injuries aforesaid, and in particular the said severe compound fracture of the lower third of the tibia of the left leg, which caused the said broken bone to protrude through plaintiff's skin and to expose plaintiff to infection and that at the site of said compound fracture there was dirt and other foreign matter; that the defendant did diagnose, treat and care for the defendant, but that the defendant in treating plaintiff did so in a negligent and careless manner.

X.

That as a direct and proximate cause of the negligence, carelessness and failure of the defendant to exercise a reasonable degree of professional skill, knowledge and care customarily exercised by physicians in the City of Portland, County of Multnomah, State of Oregon, plaintiff suffered infection of the bone of the tibia of the left leg, poor healing of the original wound, especially marked impairment of the circulation of the blood in said left leg, and was required to undergo eight further surgical procedures in addition to the initial setting of the said fracture to the left tibia, which was made after defendant's care and treatment of plaintiff in Portland,

County of Multnomah, State of Oregon, had ended and that plaintiff's healing from said subsequent operative procedures were greatly impaired, and that plaintiff has further suffered a chronic osteomyelitis of the said left tibia; that plaintiff will be required to undergo further operations and that said injuries to the left tibia are painful, disabling and disfiguring and that plaintiff does now suffer from said osteomyelitis and impairment of the circulation of the blood in the left leg, and an unhealed open wound in said left leg, disability, pain and suffering, and will continue to suffer therefrom for an indefinite length of time in the future, all to plaintiff's general damage in the amount of \$65,000.00.

XI.

That as a proximate result of the negligence and carelessness of the defendant aforesaid, plaintiff has been required to undergo hospitalization, and obtain the treatment of physicians and surgeons and to purchase drugs and medicines, reasonable value of such services and medicines being \$339.60 all to plaintiff's special damage in said amount.

XII.

That prior to the time of the injury of plaintiff and the negligence of defendant as aforesaid, plaintiff was an able-bodied man earning \$380.00 per month, and that as a result of said injuries the plaintiff has been unable to work and is unable to work at the time of the signing of this said complaint, and that as a sole and proximate result of

the negligence of defendant aforesaid plaintiff has lost the amount of \$6,460.00 in wages, all to plaintiff's special damage in said amount.

Wherefore, plaintiff demands judgment against the defendant in the amount of \$65,000.00 general damages, and the sum of \$339.60 special damages and the further sum of \$6,460.00 special damages and for his costs and disbursements herein incurred, and for reasonable attorneys' fees herein.

/s/ JOHN D. RYAN,
Of Attorneys for Plaintiff.

[Endorsed]: Filed November 17, 1953.

[Title of District Court and Cause.]

ANSWER

Comes now defendant by and through Henry L. Hess, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and by direction of the Attorney General of the United States, and for answer to plaintiff's complaint herein admits, denies and alleges as follows:

1. Admits the allegation of Paragraph I.
2. Admits the allegation of Paragraph II.
3. Defendant has no knowledge of the facts alleged in Paragraph III thereof and therefore denies the same and the whole thereof.

4. Admits the allegation of Paragraph IV except that defendant alleges that the Federal Security Agency was superseded by and is now known as the Department of Health, Education and Welfare.

5. Admits the allegations of Paragraph V except that defendant alleges that said medical care was to be furnished by the Department of Health, Education and Welfare.

6. Admits the allegations of Paragraph VI.

7. Admits the allegations of Paragraph VII except that defendant affirmatively alleges that plaintiff remained in said hospital until about 8:00 a.m. on June 12, 1952, and alleges further that the said hospital was under contract with the Department of Health, Education and Welfare rather than with the Public Health Service.

8. Admits the allegations of Paragraph VIII except that defendant alleges that the Public Health Service was superseded by an agency of the government designated as Department of Health, Education and Welfare.

9. Answering Paragraph IX defendant admits that defendant did diagnose, treat and care for plaintiff at the Physicians and Surgeons Hospital in Portland, Oregon, and elsewhere; admits further that plaintiff sustained a compound fracture at the junction of the middle and lower third of the tibia of the left leg and other injuries; admits further that a portion of the said broken bone protruded through plaintiff's skin where it was exposed to

infection and contamination; admits further that it did diagnose, treat and care for plaintiff but denies each and every other allegation, matter and thing in said paragraph contained and the whole thereof.

10. Denies each and every allegation, matter and thing contained in Paragraph X and the whole thereof and specifically denies that plaintiff was damaged in the sum of \$65,000.00 or in any other amount.

11. Denies each and every allegation, matter and thing contained in Paragraph XI and the whole thereof and specifically denies that plaintiff was damaged specially in the sum of \$339.60 or in any other amount.

12. Answering Paragraph XII defendant asserts that it has no knowledge of whether or not plaintiff was able-bodied prior to the accident hereinbefore referred to and has no knowledge as to whether or not plaintiff has been unable to work as set forth in said Paragraph XII and puts plaintiff to proof thereon, and further that defendant specifically denies that plaintiff has lost the amount of \$6,460.00 or any other sum in wages because of any negligence of defendant.

For a further and separate answer and defense, defendant alleges as follows:

1. That during the period that defendant, acting by and through the Department of Health, Education and Welfare, was rendering treatment to

plaintiff in the Public Health Service Hospital in Seattle following his removal to Seattle on June 12, 1952, plaintiff failed and refused to cooperate with defendant and defendant's medical attendants, and failed and refused to accept treatment at said hospital from and after August 13, 1952, against the advice and desire of the medical staff of defendant in attendance at said hospital at said time, and did on said August 13, 1952, notwithstanding the advice of defendant's said doctors as aforesaid, removed himself from said hospital; that defendant further alleges that any residual disability, if any, suffered by plaintiff as alleged in his complaint was proximately due to his own negligence or negligence of other medical or surgical advice and treatment contracted for by plaintiff individually.

Wherefore, defendant, having fully answered plaintiff's complaint, prays that the same be dismissed and held for naught and that defendant recover its costs and disbursements herein incurred.

HENRY L. HESS,

United States Attorney for
the District of Oregon;

/s/ VICTOR E. HARR,

Assistant United States
Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1954.

[Title of District Court and Cause.]

PRETRIAL ORDER

This cause came on regularly for pretrial conference before the undersigned Judge of the above-entitled Court, plaintiff appearing by John D. Ryan of Ryan & Pelay, and defendant appearing by C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney.

Agreed Facts

The following facts have been agreed upon by the parties and require no proof:

1. The court has jurisdiction of the within cause by virtue of Title 28, Section 1346(b), United States Code.

2. Plaintiff is a resident and inhabitant of the City of Portland, County of Multnomah, State of Oregon, and within the jurisdiction of this court.

3. At all times herein mentioned the Public Health Service of the United States of America was an agency of the defendant, United States of America, and that said Public Health Service was superseded by and is now known as the Department of Health, Education and Welfare.

4. During all times herein mentioned plaintiff was in the employment of defendant as a seaman, to wit: a third mate aboard the U. S. Dredge Wahkiakum, and as such was entitled to receive medical care from the said Public Health Service.

5. On or about the 10th day of June, 1952, plaintiff was injured in an accident not connected with his employment, and received among other injuries, a compound comminuted fracture of the lower third of the left tibia, two simple fractures of the left fibula, and a compression fracture of the body of the second lumbar vertebrae, and that by virtue of the compound cominuted fracture of the left tibia, there were two lacerations of the skin, and that the bone of the fractured tibia was exposed.

6. Thereafter and on the 10th day of June, 1952, at or about 1:15 p.m. on said day, plaintiff was received into the Physicians and Surgeons Hospital located in Portland, Oregon, and remained in said Physicians and Surgeons Hospital until June 12, 1952, at which time plaintiff was removed from said hospital by defendant and transported by ambulance to the United States Marine Hospital, Seattle, Washington, for treatment.

7. During the times herein involved, by invitation, bid and award, the Physicians and Surgeons Hospital located at 1927 N.W. Lovejoy Street in Portland, Oregon, was under contract with the Federal Security Agency, Public Health Service, of defendant to render hospital care for patients of the United States Public Health Service, which said hospital care was to consist of the best treatment afforded by said hospital, including subsistence, nursing, medical and surgical attendance (meaning such treatment, including surgery, as is usually furnished by the house staff of the hospital and necessary surgical dressings). (Plaintiff con-

tends that the agreed fact as herein set forth is immaterial to the issues herein involved.)

8. That at said time and place the defendant through its agents, servants and employees acting as physicians under the direction of the said Public Health Service entered upon and assumed the relationship of physician to the plaintiff herein as patient and pursuant to said relationship examined plaintiff and undertook to treat and care for plaintiff and impliedly agreed to exercise and use a reasonable degree of professional skill and diligence in the diagnosis, care and treatment of plaintiff.

9. That defendant did diagnose, treat and care for plaintiff's injuries as aforesaid at the Physicians and Surgeons Hospital in Portland, Oregon, and elsewhere.

Plaintiff's Contentions

1. Plaintiff contends that at said time and place, the defendant undertook to diagnose, treat and care for plaintiff as aforesaid, plaintiff was suffering from the injuries as aforesaid, and in particular the said severe compound fracture of the lower third of the tibia of the leg, which caused the said broken bone to protrude through plaintiff's skin and to expose plaintiff to infection and that at the site of said compound fracture, there was dirt and other foreign matter; that the defendant did diagnose, treat and care for the defendant, but that the defendant in treating plaintiff did so in a negligent and careless manner in the following particulars

proximately causing injuries to the plaintiff as are hereinafter more fully set forth.

(a) In failing to render to plaintiff immediate, adequate and proper medical and surgical treatment; cleanse debridment and closure of the wounds at the site of said comminuted compound fracture of the left tibia.

(b) In failing to provide plaintiff with a proper and adequate or any splint for said left leg.

(c) In unnecessarily transporting and moving plaintiff from Portland, Oregon, to Seattle, Washington, at a time when same could not be done with safety to plaintiff.

(d) In failing to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon, and like communities, in the treatment of comminuted compound fractures of the left tibia.

(e) In failing to obtain proper and adequate treatment for plaintiff and particularly for the treatment of the said comminuted compound fracture of the left tibia.

(f) In failing to properly advise the plaintiff to obtain proper, timely and adequate treatment in Portland, Oregon, for said injuries and more particularly the said comminuted compound fracture of the tibia.

2. The plaintiff contends that as a direct and proximate cause of the negligence, carelessness and failure of the defendant as heretofore set forth,

plaintiff suffered infection of the bone of the tibia of the left leg, poor healing of the original wound, especially marked impairment of the circulation of the blood in said left leg, and was required to undergo sixteen further surgical procedures after the initial setting of the said fracture to the left tibia, which was made after defendant's care and treatment of plaintiff in Portland, County of Multnomah, State of Oregon, had ended, and that plaintiff's healing of his original injury to the left lower leg and from said subsequent operative procedures was, and now is, greatly impaired, and that plaintiff has further suffered a recurrent chronic osteomyelitis of the said left tibia; that plaintiff will be required to undergo further operations and that said injuries to the left tibia are painful, disabling and disfiguring and that plaintiff does now suffer from said osteomyelitis and impairment of the circulation of the blood in the left leg and skin, with diminished regenerative quality, scarring of said left leg, and scars and wounds on the calf of the right leg and left thigh at the donor sites of skin for grafting at said left tibia wound site, and an unhealed open wound in said left leg, and demineralization of said left leg and ankle and weakness and crippling of said ankle, disability, pain and suffering, and will continue to suffer therefrom for an indefinite length of time in the future, all to plaintiff's general damage in the amount of \$65,000.00.

3. That as a proximate result of the negligence and carelessness of the defendant aforesaid, plain-

tiff has been required to undergo hospitalization, and obtain the treatment of physicians and surgeons and to purchase drugs and medicines, the reasonable value of such services and medicines being \$523.75, all to plaintiff's special damage in said amount.

4. That prior to the time of the injury of plaintiff and the negligence of defendant as aforesaid, plaintiff was an able-bodied man and was gainfully employed, and that as a result of said injuries the plaintiff was unable to work for the periods and at the rates hereinafter set forth, and that as a sole and proximate result of the negligence of defendant aforesaid plaintiff has lost the amount of \$6,388.32 in wages, all to plaintiff's special damage in said amount, which is set forth in the amounts and dates as follows, to wit:

Date		Rate Per Hour	Hours Lost	
6-11-52 to	9-18-52	\$2.10	598	\$1,255.80
9-18-52 to	10- 2-52	\$2.10	78	\$ 163.80
10- 2-52 to	12- 6-52	\$2.10	372	\$ 781.20
1-25-53 to	2-20-53	\$2.10	160	\$ 336.00
4-27-53 to	7-15-53	\$2.28	416	\$ 948.48
9-11-53 to	3-31-54	\$2.52	1152	\$2,903.04
				<hr/>
				\$6,388.32

5. Plaintiff denies each and every affirmative contention of the defendant.

Defendant's Contentions

1. Answering Plaintiff's Contention No. 1, defendant admits that it did undertake to diagnose, treat and care for plaintiff as set forth in the Agreed Facts herein, and admits the injuries suffered by plaintiff as therein set forth, but denies that defendant was negligent in any manner set forth therein or otherwise.

2. Answering Plaintiff's Contention No. 2, defendant denies the same and the whole thereof and particularly denies that plaintiff was damaged in the sum of \$65,000.00 or in any other amount.

3. Answering Plaintiff's Contention No. 3, defendant denies each and every contention made therein and the whole thereof, and particularly denies that plaintiff was damaged specially in the sum of \$523.75 or in any other amount.

4. Answering Plaintiff's Contention No. 4, defendant admits that prior to plaintiff's accident, plaintiff was gainfully employed, but denies each and every remaining contention therein, and particularly denies that plaintiff suffered loss of wages in the sum of \$6,388.32 as a result of any negligence of this defendant, nor was he damaged in any other amount.

5. Defendant contends that during the period that defendant, acting by and through the United States Public Health Service, was rendering treatment to plaintiff in the Public Health Service Hospital in Seattle following his removal to Seattle on

June 12, 1952, plaintiff failed and refused to co-operate with defendant and defendant's medical attendants, and failed and refused to accept treatment at said hospital from and after August 13, 1952, against the advice and desire of the medical staff of defendant in attendance at said hospital at said time, and did on said August 13, 1952, notwithstanding the advice of defendant's said doctors as aforesaid, remove himself from said hospital, and in writing released said hospital and staff from any and all responsibility in connection with his said injuries or the outcome thereof.

6. The defendant further contends that residual disability, if any, which plaintiff may have suffered after leaving the United States Public Health Service Hospital in Seattle, Washington, was proximately due to his own negligence, the negligence of other medical or surgical treatment contracted for and received by plaintiff, or from cause or causes unknown to this defendant.

Issues to Be Determined

The issues to be determined on the trial of this cause are:

1. Was the defendant negligent in any of the respects alleged by the plaintiff? If so, was such negligence the proximate cause of injuries, if any, received by plaintiff?

2. What was the nature and extent of the injuries which resulted from the negligence of the defendant, if any?

3. Does the contributory negligence alleged by the defendant on the part of the plaintiff constitute a defense to the claim of plaintiff against the defendant, or any part thereof?

4. In the event that said contributory negligence is considered a defense to the claim of plaintiff, or any part thereof, was plaintiff guilty of contributory negligence which proximately caused the injuries, if any, of which plaintiff is complaining, or any part thereof?

5. Does negligence, if any, on the part of the plaintiff which did not contribute to the cause but which may have aggravated the injuries, if any, constitute a proper matter of defense to all or part of plaintiff's alleged damage?

6. What was the nature and extent of the damages sustained by plaintiff, if any?

EXHIBITS

Plaintiff's

No. 1. Photostatic copy of record of treatment of Amos Morin at Physicians and Surgeons Hospital, June 10 through June 12, 1952.

Nos. 2a to b, incl. X-rays of Amos Morin taken at Physicians and Surgeons Hospital, June 10, 1952.

No. 3. Photostatic copy of hospital record of Amos Morin of United States Marine Hospital, Seattle, Washington.

Nos. 4a to j, incl. X-rays of Amos Morin, United States Marine Hospital, Seattle, Washington.

Plaintiff's Exhibits—(Continued)

- Nos. 5a to b. X-rays dated 8/19/52—Dr. Thorup.
- No. 6. Hospital record of Amos Morin at Providence Hospital, Portland, Oregon.
- No. 7. X-rays of Amos Morin, Providence Hospital, Portland, Oregon.
- No. 8. Hospital record of Amos Morin, St. Vincent's Hospital.
- No. 9. X-rays of Amos Morin, St. Vincent's Hospital, Portland, Oregon.
- No. 10. Hospital record of Amos Morin, United States Veterans Hospital, Portland, Oregon.
- No. 11. X-rays of Amos Morin, United States Veterans Hospital, Portland, Oregon.
- No. 12. Record of history of treatment of Amos Morin by Dr. Howard Cherry.
- No. 13. Campbell's Operative Orthopedics, Volume I, C. V. Mosby, St. Louis, 1949.
- No. 14. Pictorial Handbook of Fracture Treatment, Compere - Banks - Compere. The Year Book Publishers, Inc., Chicago, Illinois, Second Edition.
- No. 15. Deposition of Lee A. Craig as adverse witness.
- No. 16. Deposition of Constantine Otto Schneider.

Defendant's

- No. 17. Specimen of bone chips, 7/11/52.
- No. 18. Payroll and employment records, Dredge Wabkiakum.
- No. 19. Textbook of Surgery—Christopher.
- No. 20. USPHS Outpatient Clinical Records.

Defendant's Exhibits—(Continued)

Nos. 21a and b. USPHS X-rays, Nov. 12 and 26, 1952.

No. 22. Attorneys' Textbook of Medicine, Roscoe N. Gray, M.D.

Nos. 23a to e, incl. X-rays by Dr. Berg.

No. 24. Report and office memorandum of Dr. Warren C. Hunter.

No. 25. Office notes and memorandum of Dr. Richard Berg.

Plaintiff's

No. 26. Statements covering plaintiff's costs:

a. St. Vincent's Hospital	\$ 71.25
b. Providence Hospital	177.00
c. Dr. Thorup	111.00
d. Dr. Cherry	164.50

Conclusion

This pretrial order has been formulated after a conference between the attorneys for the respective litigants. There are no issues of law or fact except as embodied in this order and this order supersedes the pleadings as to issues of fact and law. This order will control the course of the trial and shall not be amended except by consent of the parties and the Court or by the Court to prevent manifest injustice.

Dated at Portland, Oregon, this 21st day of July, 1954.

/s/ CLAUDE McCOLLOCH,
U. S. District Judge.

The Foregoing Pretrial Order Is Hereby Approved:

/s/ JOHN D. RYAN, of
Attorneys for Plaintiff.

/s/ VICTOR E. HARR,
Assistant United States Attorney for the District
of Oregon, of Attorneys for Defendant.

[Endorsed]: Filed in Open Court July 21, 1954.

[Title of District Court and Cause.]

MEMORANDUM

The patient was admitted to the hospital at 1:45 p.m., but a Public Health surgeon did not see him until the following morning. This was gross inattention.

The impression is overpowering that the Public Health Service intended from the beginning to send the plaintiff to Seattle for the needed surgery. Their major interest was in the plaintiff's general condition—whether he would be able to stand the trip to Seattle. This explains the failure of the Public Health surgeons to see the patient the day of the accident, as might normally be expected. And, of course, no consideration was given to the alternative procedures detailed by defendant's own orthopedic expert, Dr. Berg.

Dr. Cherry testified that the osteomyelitis resulted

from the failure to close the wound at Portland, and I accept his opinion.

Findings of Fact may be submitted, with the amount of general damages left blank.

Dated August 4, 1954.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed August 4, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly for trial before the above-entitled Court before the Honorable Claude McCulloch presiding, on the 21st day of July, 1954, plaintiff appearing in person and by and through his attorneys, John D. Ryan and Thomas H. Ryan of Ryan & Pelay, and defendant appearing by and through its attorneys, C. E. Luckey, United States District Attorney, and Victor E. Harr, Deputy United States District Attorney, and the Court having heard testimony and received evidence on behalf of both parties and being fully advised in the premises, the Court finds as follows:

I.

That plaintiff was duly and regularly admitted as a patient of the Public Health Service of the United

States, an agency of the defendant, United States of America, for treatment of injuries received, plaintiff being entitled to said service the date of admission to treatment being June 10, 1952, and the place of admission being Physicians' and Surgeons' Hospital located at Portland, Oregon, which hospital was under contract with the Federal Security Agency, Public Health Service of defendant to render care in such cases.

II.

That defendant through its agents, servants and employees undertook to examine, treat and care for plaintiff and to exercise a reasonable degree of professional skill and diligence in the diagnosis, care and treatment of patient.

III.

That at said time and place the plaintiff was suffering from serious personal injuries, among them a severe compound fracture of the lower third of the tibia of the leg with a broken bone protruding through plaintiff's skin and exposed to infection at the site of said compound fracture and that at said site there was dirt and other foreign matter and defendant did diagnose, treat and care for plaintiff but defendant in treating plaintiff did so in a negligent, careless manner in the following particulars proximately causing injuries to plaintiff:

(a) In failing to render to plaintiff immediate, adequate and proper medical and surgical treatment; cleanse debridement and closure of the

wounds at the site of said comminuted compound fracture of the left tibia.

(b) In failing to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon, and like communities, in the treatment of comminuted compound fractures of the left tibia.

IV.

That as a direct and proximate result of said negligence and carelessness plaintiff suffered infection of the bone of the tibia of the left leg, poor healing of the original wound, especially marked impairment of the circulation of the blood in said left leg, and was required to undergo sixteen further surgical procedures after the initial setting of the said fracture to the left tibia, which was made after defendant's care and treatment of plaintiff in Portland, County of Multnomah, State of Oregon, had ended, and that plaintiff's healing of his original injury to the left lower leg and from said subsequent operative procedures was, and now is, greatly impaired, and that plaintiff has further suffered a recurrent chronic osteomyelities of the said left tibia; that plaintiff will be required to undergo further operations and that said injuries to the left tibia are painful, disabling and disfiguring and that plaintiff does now suffer from said osteomyelities and impairment of the circulation of the blood in the left leg and skin, with diminished regenerative quality, scarring of said left leg, and scars and wounds on the calf of the right leg and left thigh at

the donor sites of skin for grafting at said left tibia wound site, and an unhealed open wound in said left leg, and demineralization of said left leg and ankle and weakness and crippling of said ankle, disability, pain and suffering, and will continue to suffer therefrom for an indefinite length of time in the future and that plaintiff will be permanently disabled as a result thereof.

V.

That as a result of the negligence of defendant, plaintiff incurred medical and hospital bills in the sum of \$523.75.

VI.

That as a direct and proximate result of the negligence and carelessness of defendant, plaintiff lost wages amounting to \$4,187.52.

VII.

That plaintiff was not guilty of contributory negligence nor of any negligence causing an aggravation of the injuries sustained.

VIII.

That plaintiff is entitled to recover the sum of \$523.75 for medical and hospital expenses, and the further sum of \$4,187.52 loss of wages, totaling \$4,711.27 as special damages.

IX.

That plaintiff is entitled to recover the sum of \$45,000 general damages and is entitled to costs assessed at \$.....

And as conclusions of law from the foregoing facts, plaintiff is entitled to judgment against the defendant in the sum of \$4,711.27 special damages, and the further sum of \$45,000 general damages, and his costs and disbursements taxed at \$.

Dated this 10th day of August, 1954, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
Judge.

Service of Copy acknowledged.

[Endorsed]: Filed August 10, 1954.

In the United States District Court
for the District of Oregon

Civil No. 7260

AMOS MORIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause having duly come on for trial before the Honorable Claude McColloch, Judge of the above-entitled Court, on the 21st day of July, 1954, the plaintiff appearing by and through Thomas H. Ryan and John D. Ryan of his Attorneys, Ryan & Pelay, and the defendant appearing

by and through C. E. Luckey, United States Attorney for the District of Oregon and Victor E. Harr, Assistant United States Attorney, and evidence having been submitted and witnesses examined by plaintiff and defendant, and after hearing arguments of counsel, and the Court being fully informed in the premises, the Court made and entered herein on August 10, 1954, certain findings of facts and conclusions of law;

Now, Therefore, based upon the said findings and conclusions,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff have judgment against the defendant in the amount of \$45,000.00, general damages, and \$4,711.27, special damages, together with interest at the legal rate, and for plaintiff's costs taxed at \$48.98; and it is further ordered that plaintiff's attorneys, Ryan and Pelay, be awarded attorneys' fees in the amount of \$9,942.25, and that said attorneys' fees be deducted from the amount of the judgment herein given to plaintiff and paid unto the said attorneys of plaintiff, and such judgment is hereby entered in favor of the plaintiff and against the defendant.

/s/ CLAUDE McCOLLOCH,
Judge.

Dated this 26th day of August, 1954.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Amos Morin, plaintiff and T. H. Ryan of Ryan
& Pelay, attorneys for Plaintiff:

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 26th day of August, 1954, in favor of plaintiff and against defendant.

Dated this 25th day of October, 1954, at Portland, Oregon.

C. E. LUCKEY,
United States Attorney for
the District of Oregon.

/s/ C. E. LUCKEY.

[Endorsed]: Filed October 25, 1954.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard *ex parte* this day upon motion of defendant, through its attorneys, C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order extending time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable the Department of Justice to have additional time to consider

said appeal, and the Court being fully advised in the premises, it is hereby

Ordered that the time for filing the within appeal and docketing the action be and it is hereby extended to ninety days from the first date of the Notice of Appeal.

Dated this 2nd day of December, 1954, at Portland, Oregon.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed December 2, 1954.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard on motion of the defendant, United States of America, through its attorneys, C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, for an order directing the Clerk of the above-entitled Court to transmit in their original form all exhibits introduced in the within cause to the Clerk of the United States Court of Appeals for the Ninth Circuit, and it appearing to the Court that the parties, through their respective attorneys, have so stipulated, and the Court being advised in the premises, it is hereby

Ordered that the Clerk of the above-entitled Court transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, in their original form, all exhibits introduced in the trial of the above-entitled cause.

Dated at Portland, Oregon, this 14th day of
January, 1955.

/s/ CLAUDE McCOLLOCH,
District Judge.

[Endorsed]: Filed January 14, 1955.

United States District Court,
District of Oregon
Civil No. 7260

AMOS R. MORIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Honorable Claude McCulloch, Judge.

Appearances:

THOMAS H. RYAN, and
JOHN D. RYAN,
Of Attorneys for Plaintiffs.

C. E. LUCKEY,
United States Attorney;

VICTOR E. HARR,
Assistant United States Attorney, of Attor-
neys for Defendant.

TRANSCRIPT OF TESTIMONY AND
PROCEEDINGS

July 21, 1954, A.M.

Mr. John D. Ryan: Does your Honor desire an opening statement?

The Court: If you wish to make one. I have read the file and the deposition. [1*]

Mr. John D. Ryan: If your Honor has familiarized yourself with the file, I am sure you have an understanding of the case as far as we are concerned.

Mr. Harr: We will waive opening statements.

DAVID AMOS MORIN

produced as a witness on behalf of Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. Are you the son of Amos R. Morin, the plaintiff in this case? A. Yes, I am.

Q. What is your age? A. I am 16.

Q. You live at home with your folks?

A. Yes, sir; I do.

Q. Where is your home?

A. 4640 Northeast 30.

Q. Do you attend school?

A. Yes, sir; I do.

Q. Where do you go to school?

A. Central Catholic. [2]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of David Amos Morin.)

Q. Do you recall an accident at your home on June 10, 1952? A. Yes, sir; I do.

Q. Would you tell the Court: Did you see your father fall on that date?

A. I was in back of the house when it happened, but I heard him cry when he fell, and I came around the house and he was lying there under this ladder, and he helped himself—I helped him. He had his leg out over the end of the ladder.

Q. He had fallen from up on a ladder?

A. Yes.

Q. Where was the ladder sitting?

A. On the side of the house. He was painting at the time.

Q. When you came to your father, he had already fallen?

A. Yes. He was lying on the ground. Well, he was sitting there, trying to pull himself out. He had his hands on the ground, but the ladder was quite long, and he had some difficulty, so I lifted the ladder and he rolled on his stomach.

Q. Was his leg in between the rungs of the ladder? A. Yes.

Q. Was his body lying right on the sidewalk?

A. He landed on the lawn.

Q. Did you have reason to look at your father's leg?

A. Yes, sir; I did. I noticed it right away.

Q. Which leg was injured? Would you describe what you saw?

A. It was his left leg. There was blood all over

(Testimony of David Amos Morin.)

his [3] stocking and the bone was protruding out about two inches or about two and a half inches. You could see the white of the bone very clearly. It looked like it had been ripped right out through his leg. There was blood all over his stocking and his pants were bloody, so you could see it.

Q. Did you move your father from that spot?

A. He moved himself. I never touched him, but he tried to move. I tried to comfort him and he told me to get a blanket for him. I covered him with a blanket, and he told me to get a doctor and call an ambulance.

Q. Did you do that?

A. Yes, sir; I did right away.

Q. What had your father been doing that morning?

A. He had been painting that morning. He got up quite early and started painting the house.

Q. Had your father been in good health prior to his fall?

A. He was in very good health. He assisted me in sports. I had been playing football that season and he had helped me train for it. I had been hunting with him that fall, the fall before, and we had played baseball, and he participated in sports and took care of a large garden. He did most of the digging, but I helped him a little in the garden. He was trying to paint the outside of the house when he fell.

Q. How many brothers and sisters have you?

A. I have four older sisters and one younger

(Testimony of David Amos Morin.)

brother. [4]

Q. Is your father able to engage with you in any sports at this time?

A. He can't move—he can't run. He can stand and throw, but that is about it. He can't participate like he used to.

Q. Have you been able to go hunting together since he had the injury?

A. Well, we go, but he sits and I do all the hunting. I put him on a rock and I do the hunting.

Mr. John D. Ryan: Thank you.

Cross-Examination

By Mr. Harr:

Q. I have one or two questions. What time of day did this happen?

A. It was in the morning, if I remember right; it was right around 10:30 or 11:00 o'clock.

Q. Are you sure it was that early?

A. It seems to me it was. It has been quite a while.

Q. Someone informed me—it is hearsay, of course, as far as I am concerned—that it was about 12:30. Would there be any doubt in your mind as to the time?

A. There would be doubt in my mind about the time, because he had gotten up that morning and it was clouded over. It started to rain, and there was a time you couldn't tell by the sun or anything. [5]

Q. You were not paying any particular attention to the time yourself? A. No.

(Testimony of David Amos Morin.)

Q. Did the ambulance come quite soon after you called?

A. Well, it took longer—he said he could have come sooner, but my sister called him—she called him right after he fell, but she never told him it was an emergency, and he said he could have come quicker. It just took about three or four minutes to get there.

Q. Did you have a family doctor at that time?

A. Yes, we did. I went after him, but he was out to lunch.

Q. You left word with him?

A. I left word with the doctor across the street.

Q. What is the doctor's name?

A. Dr. Done.

Q. How is that? A. I think it is D-o-n-e.

Q. Does he live across the street from you?

A. Across the street from Dr. Thorup.

Q. Did you go to the hospital with your father?

A. No, my mother came home from work and she went with him.

Q. You say when you went around the house you examined his leg?

A. Yes. I looked at it quite closely.

Q. Was his pant leg up at that time, or did you pull it up? [6]

A. No, it was up. I didn't want to touch him.

Q. His leg, you said, was stuck through the rungs of the ladder?

A. When he had fallen, yes. It looked like, on the way down, his leg had went through.

(Testimony of David Amos Morin.)

Q. Was he lying on his stomach? How was he lying? On his stomach or back?

A. He was lying on his back. He fell on his back. When I took him out of the ladder, I mean, he turned over; he rolled over with the ladder. After I took it out, he was lying on his stomach.

Q. As you pulled the ladder out, he continued to lie on his back?

A. No, he rolled over on his stomach.

Q. Do you know how old your father was at that time? A. 43, I think.

Q. Had your father been to any doctors before that, to your knowledge?

A. Not that I know of. I don't think so.

Q. As far as you know, had he ever been to a doctor?

A. Yes, he had had ulcers a couple of years before that. He was up in Seattle with ulcers.

Q. He was treated first in Portland, wasn't he, by the U. S. Public Health Service, or do you know?

A. I think so. [7]

Q. Then he went to Seattle, to the Marine Hospital there? A. Yes.

Q. That is a Public Health Service Hospital?

A. Yes.

Q. At the time you came around to your father, when he was on the ground, you said first you heard him cry? A. Yes.

Q. Was that yelling for help?

A. No, he yelled as he came down the house; as the ladder slid down the house he yelled.

(Testimony of David Amos Morin.)

Q. He yelled at that time? A. Yes.

Q. And you came running around the house?

A. Yes.

Q. By the time you reached there he had reached the ground and the ladder was tangled up with him?

A. Yes, he was laying on the ground.

Q. Was there a crowd there then?

A. You could hear him all over the neighborhood and the neighbors came out right away.

Q. But he was not unconscious?

A. No, he wasn't. He directed us.

Q. He told you what to do? A. Yes.

Q. At that time did he complain of having pain in any part [8] of his body?

A. He said his leg hurt him. He said it was real sore. He couldn't move his leg or anything.

Q. At that time did he say anything about his back injury, about his back hurting him?

A. Yes, I asked him where it hurt and he said his back, but "mostly in my leg."

Mr. Harr: No further questions.

(Witness excused.) [9]

DALE MORIN

produced as a witness on behalf of Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. You are Amos Morin's son? A. Yes.

(Testimony of Dale Morin.)

Q. Would you tell the Court your age?

A. I am 14 now.

Q. Where do you go to school?

A. I will be going to Central Catholic.

Q. Where have you been going to school?

A. St. Charles.

Q. Were you at home the day your dad was hurt,
June 10, 1952? A. Yes.

Q. Where were you when your father fell from
the side of the house?

A. I was in back helping my brother plant corn.

Q. Which brother is that? A. David.

Q. Will you tell us what you did at that time?

A. We heard him holler, cry out, and we went
around to the front and he was laying on the ground,
down on the ground, and his leg was in the ladder.
We helped him get his leg out of the ladder, and he
directed us and we went—I went down with [10]
my brother to get the doctor. Then we came back
and a few minutes later the ambulance came.

Q. Did the doctor come at that time?

A. Dr. Done did.

Q. What did he do? Were you there when he
came? A. He gave my father a shot.

Q. Did he do anything else?

A. Well, he put a tape on his head to show what
was wrong, and then left—he said he had to go; he
said he had another call to make.

Q. Do you remember what that tape said?

A. It said he had a compound fracture of the
leg and a crooked vertebra in the back.

(Testimony of Dale Morin.)

Q. Did you look at your father or have reason to look at your father? A. Yes, sir; I did.

Q. To see what was the matter with him?

A. Yes. I saw his leg and the bone was sticking out.

Q. How was he lying on the ground there? Could you describe how he was lying?

A. He was laying on his back, and when we took the ladder out from under him and got his leg out, then he rolled over on his stomach.

Q. Did you look at his leg closely at that time?

A. Yes, I looked at it. You could see the bone was broken [11] and it was sticking out of the leg about two and a half inches.

Q. Can you show us on your own leg which side of the leg the bone was sticking out?

A. The bone was sticking out on this side of the leg.

Q. You are pointing to the outside?

A. Yes.

Q. The front part, is that where it was sticking out? A. Yes.

Q. Can you tell us what it looked like?

A. A big gash and quite a bit of blood and bone was sticking out about two and a half inches.

Q. Do you have any idea of the size of the gash or cut?

A. It was about two and a half or three inches long.

Q. Did the ambulance come soon after he fell?

(Testimony of Dale Morin.)

A. Quite soon, about three or four minutes.

Q. Did they take your father to the hospital right away?

A. Yes, if I remember right they did.

Q. Was your father active before this injury?

A. Very much so. We played sports, football—he did play baseball; he would participate with me in it.

Q. Is he able to do that now?

A. No. He can stand and throw the ball back and forth.

Q. Did you go to the hospital with your dad?

A. No, I didn't. [12]

Q. Did he ever play tennis with you boys?

A. Yes, he played quite a bit. He never played with us, but we watched him play with the girls, my sisters.

Q. How often would he do that?

A. About once a week; about every Sunday.

Q. Does he play tennis any more?

A. No, he does not, not at all.

Q. Did he ever go swimming with you?

A. Yes, he did.

Q. Has he been able to do that?

A. No, he has not been swimming.

Mr. John D. Ryan: That will be all. Thank you.

Cross-Examination

By Mr. Harr:

Q. You said the doctor came to your house?

A. Dr. Done did, yes.

(Testimony of Dale Morin.)

Q. I beg your pardon? A. Dr. Done.

Q. How is that spelled?

A. I think it is spelled D-o-n-e.

Q. That is the doctor from across the street?

A. He is across the street from Dr. Thorup.

Q. That is not across the street, then, from your house? A. No, it is not. [13]

Q. Dr. Thorup was not at home at the time and you went to Dr. Done's house? A. Yes.

Q. Dr. Done came and gave him a shot at the house?

A. Yes, he came to our house and gave him a shot.

Q. And you say he made out a little memorandum or note to the effect that it was a compound fracture of the leg and a fracture of the vertebra?

A. A crooked vertebra, yes.

Mr. Harr: No further questions.

Mr. John D. Ryan: That is all.

(Witness excused.) [14]

MRS. SHIRLEY CANNARD

produced as a witness on behalf of Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. Are you Mr. Amos Morin's daughter?

A. Yes, I am.

(Testimony of Mrs. Shirley Cannard.)

Q. Were you at the family home, Mr. Morin's home, on June 10, 1952?

A. We drove up shortly after it happened.

Q. You drove out to the house shortly after the accident happened, the accident that you have heard described by the other witnesses?

A. Yes.

Q. Would you tell us what you observed?

A. We drove up, and one of the neighbors was coming across the street and he said, "Your dad is hurt." I looked over and Dad was lying there—part of his body was on the sidewalk and his head was in the flower bed. The rest of his legs were on the lawn. He—his leg was bent in over a rung of the ladder, and at that time he was lying more or less on his right side, and the bone was sticking out and there was blood all over, and the skin was all torn where it came through, because the bone was pointed.

At that time Dad had told the boys to go for [15] a doctor and told me to get an ambulance. I asked him which hospital he wanted to go to, and he told me—he didn't tell me, and so I thought he would probably want to go to Providence and I told the ambulance driver he would go to Providence, but he said, "No. I want to go to Physicians and Surgeons because my insurance is covered there, my insurance cover there." We had him covered up with some blankets. About that time the boys came back with Dr. Done and he made out a memorandum. I don't remember just what it said, but I know he did put something on it which would tell what kind of medicine he had given to my Dad. He told me to be sure

(Testimony of Mrs. Shirley Cannard.)

to tell the ambulance attendant that there may be something wrong with his back, to be careful of that.

Q. Did you go with your father to the hospital?

A. I went in the car, yes. I called my mother and she came home.

Q. You say your father was over on his side?

A. I believe he was lying on his right side.

Q. When did you arrive at the hospital?

A. Well, as I remember, the accident happened between 12:00 and 12:30. He was taken right to the hospital and I imagine it would take about 15 or 20 minutes to get to the hospital. The ambulance might do better than that. We went directly to the hospital.

Q. Did you go to the hospital after the ambulance did? [16]

A. Yes, afterwards.

Q. How long afterwards did you arrive at the hospital?

A. Well, when we arrived there Dad was already—had already been taken in the emergency room, and we waited out in the lobby.

Q. When did you next see your father?

A. I didn't see him in his room. Mother and I believe my older sister were the only ones who got to see him in his room. They wheeled him into his room. I don't know whether they gave him any treatment or not. We just saw this blanket over him.

Q. About what time of day was that?

A. It could have been about 1:00 o'clock or 1:15. I am not definite as to the time.

(Testimony of Mrs. Shirley Cannard.)

Q. When did you next see your father?

A. I didn't see him for two weeks. I did not have the chance to go up to Seattle for two weeks, because I was going to school, so I didn't see him for about two weeks.

Mr. John D. Ryan: Thank you.

Cross-Examination

By Mr. Harr:

Q. I think Counsel asked you if you knew what time it was you arrived at the house, and I did not catch your answer?

A. I said probably between 12:00 and 12:30. I was going to [17] school at the University of Portland that summer. I believe it was on a school day, and we always got home around noontime.

Q. Had the accident just then happened?

A. It had just happened. They had just gotten the ladder from under his leg.

Q. You say a part of his body or torso was up on the sidewalk? A. Yes.

Q. Do you know whether or not he had been moved from the time the accident happened until you got there, other than removing the ladder?

A. I don't know if he had been moved or not or how much he was moved.

Q. Was the blanket under him or over him?

A. No, the boys had spread the blanket over him.

(Testimony of Mrs. Shirley Cannard.)

Q. Was he lying quietly?

A. Well, he was just complaining of his leg and every once in a while he would groan with pain.

Q. In his back?

A. In his back and leg both. He said it was just like a thousand needles sticking in it.

Q. You lifted the blanket to look at the leg?

A. His leg wasn't covered. They put the blanket over his shoulder because they didn't want to get anything in his leg. [18]

Q. So the blanket was just over his——

A. Over his shoulders and about down to his knee.

Q. You were careful and had been careful to see that nothing touched his injured leg?

A. We didn't take anything away from his leg; left it just as it was. It was starting to rain, so we covered up everything but his leg, because we did not have an umbrella at the time.

Q. You don't know whether he was actually lying partially on the sidewalk before?

A. I don't know because I wasn't there when it happened.

Mr. Harr: That is all.

(Witness excused.) [19]

MRS. FLORENCE MORIN

produced as a witness in behalf of Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. You are the wife of Amos Morin, the plaintiff in this case? A. Yes.

Q. Where do you live?

A. 4640 Northeast 30.

Q. Is that where you were living on June 10, 1952? A. Yes.

Q. Were you present at your home on June 10, 1952, when your husband suffered a fall from a ladder?

A. No, I was at work when he fell, and my daughter Shirley called me at work and told me my husband had been injured, and I asked her how severely and she said, "I think his leg is broken." She didn't want to upset me. She said, "I think you should come home right away."

Q. You were working at the airport at that time?

A. Yes, the Portland International Airport.

Q. Did you come immediately to your home?

A. Yes.

Q. Have you some idea what time it was when she called?

A. It seems to me it was 12:30, between 12:30 and 1:00 o'clock. [20]

Q. How long did it take you to get from the airport to your home?

(Testimony of Mrs. Florence Morin.)

A. I don't believe it took me more than ten minutes, twelve at the most.

Q. You were driving your own car?

A. Yes.

Q. When you arrived at your house, would you tell us where your husband was?

A. Yes. He was lying across the sidewalk. His trousers was on the sidewalk; his feet were lying on the grass, with his head in the flower bed near the house.

Q. Where was the lower part of his leg, between the knee and foot? A. Just on the grass.

Q. That is, his left leg? A. Yes.

Q. As well as his right leg? A. Yes.

Q. Go on and describe what you saw.

A. When I drove up, the ambulance had just arrived and the attendants were standing there by him. I knelt down and talked to him just a minute and he was in quite a bit of pain. He said his leg was just throbbing and he was hurt quite badly. It took three of the men to lift him onto the stretcher. I didn't actually see the bone of his leg, but I could see the [21] ankle and foot and it looked crooked to me, and I could tell by that it was definitely broken because it was laying at an off-angle with reference to his body.

Q. Did your husband complain of his back?

A. A little, but the children had told me the doctor said to be careful in moving him, that his back might be injured.

Q. Was he conscious and able to talk to you?

(Testimony of Mrs. Florence Morin.)

A. Yes.

Q. Rationally? A. Yes.

Q. Have you some idea of when the ambulance left with him for the hospital, what time?

A. I can't give you a definite time. It seems it was around 1:00 o'clock.

Q. Did you accompany your husband to the hospital in the ambulance? A. Yes.

Q. Was he covered in the ambulance?

A. I don't remember. I believe he was. Yes, I believe they had a blanket over him.

Q. Did you arrive with your husband at the Physicians and Surgeons Hospital?

A. Yes.

Q. Would you tell what took place then?

A. They took him into the emergency room and they had me [22] out in the hall, and I heard them say, "Mr. Morin, we are going to have to cut your trousers off," and he said, "I don't care; I don't care, my leg is just hurting so bad." Then I didn't hear any more. They closed the door there and I just waited. I waited until away in the afternoon, when either a doctor or an intern came to me and said, "Mrs. Morin, Mr. Morin's back has been fractured and he has an open fracture in his leg. You may go in to see him now." That was in the afternoon.

Q. Do you know who that doctor or intern was who gave you that information?

A. No, I wouldn't know him.

Q. Did you then go into your husband's room?

(Testimony of Mrs. Florence Morin.)

A. Yes.

Q. Was he in a room or ward?

A. He was in a ward.

Q. What did you observe when you went into the room or ward where your husband was?

A. They had the leg lying on a pillow; it was just resting on a pillow, just light—there was no traction. It seemed to me there was just padding or a bandage laid over his leg; it wasn't bound up. He wanted his foot out because he couldn't rest with his foot covered, so I moved the sheet off his foot, so I could see some sort of a bandage just wrapped over it; it looked like something lying there over his leg, on a pillow. [23]

Q. You did not lift or touch the bandage, did you? A. No.

Q. Was any doctor or nurse in attendance when you went in there? A. No.

Q. Was your husband at that time able to talk with you?

A. Well, he talked with me. He was talking and he was awake but every now and then he would repeat the same thing over and I wouldn't know whether he was rational or whether he wasn't but he would repeat the same thing over again and again, every now and then he would.

Q. This time you are describing when you saw your husband was in the later afternoon of June 10, 1952? A. Right.

Q. Did any other representative of the hospital or the U. S. Public Health Service talk with you?

(Testimony of Mrs. Florence Morin.)

A. Any doctor?

Q. Yes.

A. No. I came back in the evening and stayed with him as long as they would allow us to visit.

Q. On June 10th, did anybody talk or discuss with you the question of his treatment?

A. No, not on June 10th.

Q. Did anyone discuss personally with you the question of his treatment on June 11th? [24]

A. On June 11th, when I went to see him—I worked until 2:00 and I got to the hospital about 2:30, when I went to see him. I believe it was a nurse who told me Mr. Morin was to be taken to Seattle to the hospital there, and I said, “No, I don’t want that.” I was quite upset about it because under the circumstances I thought he should be taken care of there, the fracture, anyway, of his leg, and when I got home I called Dr. Craig at his office and I asked him why they were sending Mr. Morin to Seattle, and he said, “We are not financially able here to keep any long-term patients. Mr. Morin will be a long-term patient and we send all these long-term patients up to Seattle.”

I said, “What will they do to Mr. Morin in Seattle”? And he said—he kind of half-laughed about it and he said, “He won’t be back to work for six months.” I said, “That is not what I am asking you. I am asking what they will do to Mr. Morin,” and I said, “First, I think that leg should be set.” He said, “Sometimes it is eight days or more before

(Testimony of Mrs. Florence Morin.)

they set a leg," and I said, "What do you think that they will do for him up there"?

That is what I was trying to get at, what they would do for him there; when he went to work was not of concern, but, rather, what could be done for him.

Q. Did he say what he had done for him?

A. No, he didn't say he had done anything, or what. [25]

Q. Did he say anything to you when you told him he was a veteran and able to go to the Veterans Administration Hospital?

A. No, he said, "We send our patients up north. When they come in here in this hospital and they are long-term patients, we send them to Seattle."

Q. Did he discuss with you the treatment of Mr. Morin under the Blue Cross? A. No.

Q. You did tell him Amos was under the Blue Cross? A. Yes.

Q. Is that the extent of your conversation, approximately, with Dr. Craig? A. Yes.

Q. Was this in person or by telephone?

A. It was by telephone.

Q. And this was on June 11th?

A. June 11th.

Q. How did you know to call Dr. Craig?

A. They told me Dr. Craig had said he was going to be sent to Seattle. The nurse told me that, so, naturally, I knew Dr. Craig had been in attendance on him and I naturally called him first to talk to him to see why he was being sent to Seattle.

(Testimony of Mrs. Florence Morin.)

Q. Did you see your husband again after June 11th in Portland? [26]

A. I saw him on June 11th in the afternoon and again at night, during visiting hours at night.

Q. What was his condition when you saw him in the afternoon?

A. Well, he seemed sort of drowsy. I asked him if he knew he was going to Seattle, and then he seemed to know it and——

Q. Did you observe his leg in the afternoon on June 11th?

A. It was just—it looked just the same to me; just lying on a pillow.

Q. Did you observe bandages or anything?

A. It still looked just the same. It looked like—didn't look like there had been any change there at all, because I was looking for traction or something to be done.

Q. Any cast on the leg? A. No, no cast.

Q. On the evening of June 11th could you give us some idea of your husband's condition?

A. Well, he was just about like he had been in the afternoon. He was sort of drowsy and groggy. He wasn't saying a whole lot. It seemed like every time he would move or say anything he would complain that he was hurting.

Q. At any time between the 10th and 11th or until your husband was taken out of the Physicians and Surgeons Hospital on the 12th, did any member or representative of the U. S. Public Health Service contact you and ask what disposition you

(Testimony of Mrs. Florence Morin.)

wanted [27] to have made of your husband's treatment, other than Dr. Craig's conversation?

A. No.

Q. Did you see any doctor in attendance upon your husband at any time that you visited the hospital?

A. There was a doctor—I think it was a doctor—in the room. He was working on another patient across from Mr. Morin when I was talking to Mr. Morin about going to Seattle. I was trying to find out if he knew he was going.

This doctor said, "Oh, yes, he knows he is going to Seattle." I don't know who the doctor was. I didn't pay much attention to just who it was. I was more concerned for Mr. Morin than anyone else.

Q. Did you see your husband on June 12th?

A. No.

Q. When did you next see your husband after June 11th? A. June 14th.

Q. Where was that?

A. In Seattle, in the hospital there.

Q. Had you been in the Seattle hospital prior to June 14? A. Had I been there prior to that?

Q. Yes. A. Yes.

Q. When did you go to Seattle?

A. We went up in the morning and it seems like we got in [28] about 11:00. I am not just positive of the time, but we drove up. My oldest daughter and I drove up in the morning and we visited him there before noon.

(Testimony of Mrs. Florence Morin.)

Q. That was on June——

A. ——14th.

Q. June 14th?

A. Saturday, June 14th.

Q. You went out to the U. S. Marine Hospital?

A. Yes.

Q. Were you able to see your husband immediately? A. Yes, they let us in to see him.

Q. Where was he?

A. He was in a room by himself and there was an orderly there, and he was taking care of Mr. Morin. He was sitting by his bed, because he was rolling and rising in pain. He had a body cast on and a full leg cast.

This orderly said, "What did they do to Mr. Morin? He is almost dehydrated. As long as you folks are here, will you please give him all the liquids he can take and each time he takes it write down the amount and what he takes on this sheet of paper," and he left a sheet of paper and a pencil there.

So we waited, my daughter and I. We left only long enough to have a bite to eat and we came back in the afternoon and stayed with Mr. Morin, doing the same thing, [29] but when I went out to get lunch a nurse stopped me in the hall and she said, "What in the world happened to that man? We don't have any record of it. What happened? How did he get hurt"?

She said, "He came in here and we treated him

(Testimony of Mrs. Florence Morin.)

just like an emergency. It was a matter of taking him right to the operating room and setting the leg."

She said, "He was sent from down there with the bone sticking through the flesh of his leg," and I said, "I didn't know that." When I saw him, they had already put on the body cast.

Q. Did you see your husband's arms exposed?

A. Yes. Both arms were bruised like they may have been tied down. Both arms along here were bruised. The back of his head was all scraped like it had been rubbing against something here.

Q. Did you observe these bruises previously when you saw him at the time of the accident or at the Physicians and Surgeons Hospital?

A. No.

Q. How about the scraping on the back of his head? A. No.

Q. Your husband is bald, isn't he?

A. Yes. His head was scratched. There was a red scratch right down the middle of his head. [30]

Q. Did any of the physicians in attendance at the hospital talk to you about the treatment of Mr. Morin other than the nurse and the orderly that you have testified about? A. There in Seattle?

Q. Yes.

A. That is all that talked to me at Seattle.

Q. What was the condition of your husband when you arrived? Was he rational or not?

A. No; Mr. Morin, I don't believe, knew us. He was twisting and turning; he was in quite a bit of pain and agony. I don't believe he knew us.

(Testimony of Mrs. Florence Morin.)

Q. Had your husband been an active man previous to this injury?

A. Oh, yes; very much so.

Q. Did you folks engage in any social life, the usual social life?

A. Oh, yes; we danced and went swimming, and played some tennis, and he played a lot of ball with the boys.

Q. Were you accustomed to dance socially?

A. Yes.

Q. About how frequently would that be?

A. Probably once a month we would go dancing, maybe more often.

Q. Has he been able to participate in dancing since then?

A. No, he has not. He can't even work in the garden. [31]

Q. Did he enjoy dancing before? A. Yes.

Q. From your observation, anyway?

A. Yes, very much.

Q. Was your husband a swimmer? Did he enjoy swimming?

A. Yes, he was quite a good swimmer.

Q. Was he out with you frequently or infrequently during the summer?

A. During the summer we went maybe once a week swimming.

Q. Has he been able to do that, according to your observation, since he returned?

A. No, he has not been swimming at all.

Q. How many children have you people?

(Testimony of Mrs. Florence Morin.)

A. We have six.

Q. How many of them are living at home now?

A. Three.

Q. How many were living with you at home at the time of the accident? A. Four.

Q. Did Shirley leave soon after that?

A. Yes, Shirley was married later.

Q. What are the ages of the three children that are now at home? A. 14, 16 and 18.

Q. Did your husband help around the house, or was he one [32] of those fellows who is not much of a handyman?

A. He was a great helper, of great help. It seemed like he couldn't sit still in the evening; he had to have something to do, some kind of work or hobby. He would work in his garden.

Q. What kind of a garden was it? A vegetable garden? A. A vegetable garden.

Q. Did he aid you in doing the household chores?

A. Oh, yes; if I wasn't well, and if we wanted to go somewhere he always helped me in the work.

Q. You said you were employed at the airport in the restaurant. Are you working now?

A. No, not now.

Q. Were you working regularly at the time of his injury? A. Yes.

Q. Did you continue to work after that?

A. Yes.

Q. When did you cease working?

A. February 20 of this year, 1954.

(Testimony of Mrs. Florence Morin.)

Q. Is he able to be of any assistance around the house now?

A. Not too much, no. It hurts him if he has to walk, so he takes it pretty easy now.

Q. Is he able to engage in any of his former activities? A. No.

Q. Have you some idea when he got to the hospital, the [33] Physicians and Surgeons Hospital?

(Recess.)

(Question read.)

Q. (By Mr. John D. Ryan): I asked you if you had some idea what time your husband got to the Physicians and Surgeons Hospital in Portland, Oregon, on June 10, 1952?

A. As near as I can place it, it was shortly after 1:00, around 1:00 or shortly after.

Q. Do you know of your own personal knowledge what time he left the Physicians and Surgeons Hospital?

A. I called up over there and they said he had left in the late morning.

Q. On which date, please?

A. The morning of the 12th.

Q. Of June?

A. Yes. I thought probably if he hadn't gone I could see him when I got off work, but they said he had left that morning.

Q. You have testified you saw your husband on June 14th in Seattle at the Marine Hospital?

A. That is right.

(Testimony of Mrs. Florence Morin.)

Q. At the time you saw him he was in bed?

A. Yes, and he had on a leg cast and a body cast.

Q. He had a leg cast and a body cast? [34]

A. Right.

Q. You observed the bruises on his arm and on the top of his head, abrasions on the top of his head?

A. Yes.

Q. Were you able to stay at the hospital with your husband at that time?

A. I stayed until Monday. I was with him as much as they would let me stay during the three days.

Q. The 14th would be Saturday?

A. The 14th, 15th and 16th.

Q. What was the condition of your husband during that time that you saw him?

A. The first day he didn't seem to be rational. Sunday, I think, he recognized us a little, and then Monday, I believe, he knew that we were there and who we were.

Q. When did you next see your husband?

A. The following week end on Saturday. That would be the 21st.

Q. Was he still in the same cast?

A. Yes, still had the same cast.

Q. The following week end would be June 21st?

A. Right.

Q. Had he become rational?

A. Yes, he knew us then.

Q. What was his condition? [35]

(Testimony of Mrs. Florence Morin.)

A. Well, he was in quite a lot of pain, and he said he didn't feel the bone was set. He said it felt like he could feel the bone scraping in the cast, grating in the cast.

Q. On June 14th did he complain about his leg?

A. Oh, yes. He rolled in bed, in pain; his back was hurting; his leg was hurting him.

Q. And on the 21st the same thing again?

A. Yes, he was still in quite a lot of pain with his leg.

Q. How long were you able to stay with him on the 21st?

A. I visited him in the evening of the 21st. I got up there in time to visit him in the evening after dinner, and then on Sunday during visiting hours, and then I left again for Portland.

Q. Did you return again to see him after that?

A. Yes, each week end I drove up there.

Q. The next week end would be approximately the 29th of June, if the 21st was a week end?

A. Yes.

Q. Had there been any change of the cast at that time?

A. Well, I can't remember as to just the date, no. I know he was changed into a ward with a number of other patients and I can't remember for sure whether he had on this cast or what they had done for him. I know he was still in a body cast. They had changed his body cast and put one on [36] which was tighter than the one they previously had, but the date I can't tell exactly.

(Testimony of Mrs. Florence Morin.)

Q. Did he have any further surgery at the Seattle Hospital?

A. At Seattle they put a metal plate of some sort on the bone.

Q. Was that approximately July 15th that that took place? A. I can't remember the date.

Q. Were you there at the time this surgery took place at the hospital? A. No.

Q. Up to the time they did that, had the cast been opened?

A. Yes; there had been a window cut in it. It had been bleeding quite profusely.

Q. Was this prior to the operation that you are talking about? A. I believe it was.

Q. Prior to the operation on the 11th or the 13th did any member of the staff, any doctor, discuss Mr. Morin's case with you?

A. No, they did not.

Q. Did—it is your recollection that a window had been cut in the cast after that?

A. Yes. I am pretty sure it was. I am not positive, but I am pretty sure it was.

Q. After the operation in July, the 11th or 13th, when did [37] you next see Mr. Morin?

A. I saw him each week end; each Saturday and Sunday I saw him up until the time he came home.

Q. After that operation was the cast on his leg?

A. In Seattle, you mean, after his operation?

Q. Yes. I am talking about the operation of July 13th. A. Yes, they had a cast on his leg.

Q. From the time the operation took place until

(Testimony of Mrs. Florence Morin.)

Mr. Morin left the hospital did you observe a window in the cast at any time?

A. Yes, it seems he couldn't stand the cast very long before they would have to cut a window in there to relieve the pressure. There seemed to be pressure on the leg, and it would commence to pain him badly, and they would cut a window in the cast.

Q. Did you have opportunity or reason to see the open wound at any time?

A. No; not at Seattle.

Q. Was any treatment being given to the open wound in your presence?

A. Not to my knowledge.

Q. It is my understanding that Mr. Morin left the hospital on or about the 13th of August?

A. Yes.

Q. 1952? [38] A. That is right.

Q. Were you at the hospital prior to the time Mr. Morin left?

A. No. I came up and as soon as we could get the papers together for his release we left shortly. I was just there a little while.

Q. Did you at the time this was being done have reason to talk with any of the hospital staff?

A. No.

Q. Did you take Mr. Morin from the hospital to Portland, Oregon? A. Yes.

Q. How did you transport him?

A. In the car.

Q. At the time you transported him, would you describe the condition of the cast, if you can?

(Testimony of Mrs. Florence Morin.)

A. Well, it was just a cast. That is all I could tell you.

Q. Was there a window cut in the cast?

A. I believe there was a window in the cast.

Q. Do you recall whether the cast was sealed or whether it was open?

A. I believe it was sealed.

Q. When you arrived in Portland—first of all, when did you arrive in Portland after leaving on the 13th of August from Seattle? [39]

A. I don't believe I could tell you the exact time. It was early afternoon.

Q. Do you know what time you left Seattle?

A. No, sir; I don't.

Q. Where did you take Mr. Morin when you reached Portland?

A. I brought him directly home and put him to bed.

Q. Put him to bed? A. Yes.

Q. Did you contact any doctor?

A. Yes, I talked to Dr. Thorup and he saw him on the 14th.

Q. That would be the following morning?

A. Yes, the following day, the following afternoon.

Q. Did Dr. Thorup give him any treatment, to your observation?

A. He gave him penicillin. I think he saw to it that he had a shot of penicillin every day.

Q. Did Mr. Morin leave the house for treatment after the 14th?

(Testimony of Mrs. Florence Morin.)

A. No; the nurse came to the home and gave him shots of penicillin.

Q. Did you ever take him to Dr. Thorup's office?

A. Not right then, I don't believe, no.

Q. Did he go to Dr. Thorup's office between August 13th and August 24th?

A. I don't remember. I believe he did. [40]

Q. Did Mr. Morin go to any other hospital after leaving the Marine Hospital at Seattle?

A. Yes; he went to the Providence Hospital.

Q. How soon after he got home from Seattle was that?

A. I couldn't give you the date, but it was not too long afterwards. Dr. Thorup called in Dr. Cherry to work on his leg. I believe they set it at one time and then another time I believe they removed the metal plate from his leg, also.

Mr. John D. Ryan: I have no further questions.

Cross-Examination

By Mr. Harr:

Q. Did Mr. Morin tell you on the day he arrived at Seattle that he took the cast off himself?

A. The cast on his leg?

Q. Yes. He didn't tell you that? A. No.

Q. Did he tell you that he fell from the stretcher onto the floor? A. Yes, I knew he fell.

Q. He told you about that? A. Yes.

Q. That was shortly before you brought him home, I believe? A. Yes. [41]

(Testimony of Mrs. Florence Morin.)

Q. Did you talk to Dr. Craig or any of the other doctors here in Portland?

A. I called Dr. Craig on the phone.

Q. In talking to him you told him he was a veteran and was entitled to treatment at the Veterans Administration Hospital?

A. I told him that he was a veteran and that we had Blue Cross.

Q. What was your reason for telling him that?

A. Because I didn't want them to take him to Seattle where I couldn't see him very often, because I was working and I knew then I would have to continue to work and with him in Seattle it would be difficult for me to go up there to see him. I wanted him here—I didn't tell him I wanted him here, but that is the reason I mentioned the Blue Cross and his being a veteran, because I would much prefer that he stay in Portland where I could visit him every day.

Q. Up to that time did you have a feeling you would have preferred to have had him under the Blue Cross or under the Veterans Administration care?

A. I thought I would still have him here, that he would be here in Portland. That would be where I could visit him.

Q. You misunderstand the question. Up to the time you got word, up to the time you found out they were going to transfer him to Seattle, up to that time had you indicated any desire [42] of him being under the Blue Cross?

(Testimony of Mrs. Florence Morin.)

A. No, I didn't.

Q. In fact, you signed a statement, didn't you, where you accepted, on behalf of your husband, treatment by the U. S. Public Health Service?

A. Treatment here in the hospital.

Q. You remember signing that?

A. Yes. I understand that because they had to have his name and address, and so forth.

Q. Up to that time you were satisfied with the fact that he would be treated by the U. S. Public Health Service? A. Yes, here in Portland.

Q. Did you do anything about that? This was on the afternoon of the 11th, you said?

A. Yes. Then when I went to visit him in the afternoon I found he was being transferred to Seattle and that upset me quite badly. I didn't like the idea of him being so far away. I called Dr. Craig when I arrived home, called him at his office and talked to him there.

Q. What time was that in the afternoon?

A. After visiting hours at the hospital, after we were there. I don't know exactly. It was in the afternoon, as soon as I arrived home.

Q. What time would you arrive home, ordinarily?

A. I don't think the visiting hours were over an hour or [43] an hour and a half, but I am sure it was before 4:00 o'clock that I called him.

Q. Did you talk with your family doctor, Dr. Thorup? He was your family doctor?

A. Yes.

(Testimony of Mrs. Florence Morin.)

Q. Did you tell him you did not want your husband to go to Seattle?

A. No, I didn't talk to Dr. Thorup about the trip to Seattle. I just talked to Dr. Craig.

Q. Did you tell anybody else you did not want him to go to Seattle?

A. Only the nurse. I told her I was very unhappy about his going there.

Q. Other than what the nurse told you when you were in Seattle, which I believe you said was June 11th, is that right?

A. No, June 14th.

Q. The 14th?

A. Yes.

Q. Other than what the nurse told you to the effect, "Well, we don't know anything about what had happened to him," other than that you did not talk to any of the doctors to find out if they had received any history that accompanied him on the ambulance?

A. No; just the nurse is all I talked to about that. [44]

Q. When you saw your husband in the Physicians and Surgeons Hospital at Portland, you just lifted the sheet and it seemed to you like there was a bandage across his leg?

A. Yes. There was something lying across his leg. I uncovered his foot and ankle.

Q. Do you know whether or not the wound was splinted, splinted or bandaged?

A. No, there didn't seem to be any bandage around it; just seemed to be one laid over it.

(Testimony of Mrs. Florence Morin.)

Q. Are you able to say definitely that there was no bandage on the leg?

A. Not to my suspicion there wasn't.

Q. You are giving us your impression; that is what you are giving us now?

A. I couldn't say positively that there was a bandage around the leg or that there wasn't. I know that there was just a covering over it.

Q. You have not examined the hospital records yourself, have you? A. No.

Q. You have talked to your attorneys frequently about the case and have talked to them recently?

A. Not too frequently.

Q. Of course, your attorneys have examined the records both of the Physicians and Surgeons Hospital and of the [45] hospital in Seattle. Did they tell you that the records show that your husband while he was there for nearly a month complained almost entirely of pain in his back and not in his leg?

A. No. When I was with him, it was his leg that he complained of.

Mr. John D. Ryan: I do not think that is proper examination.

The Court: Go ahead.

Q. (By Mr. Harr): He came back from Seattle at his own request, did he not? A. Yes.

Q. And against the advice of the doctors there, is that not true? A. Yes, that is true.

Q. They told him that if he were to leave the

(Testimony of Mrs. Florence Morin.)

hospital it would be at his own risk, that they would not be liable for anything that might happen?

A. I don't know that they told him that, no.

Q. You did not see the doctor?

A. That is right.

Q. He came to Portland and of course went immediately under the care of your family doctor, Dr. Thorup? A. Yes.

Q. Did you then see the wound itself? [46]

A. No, not right then.

Q. Was the cast on at the time he went to the hospital, Providence Hospital, the latter part of August? A. Yes.

Q. That is the time that Dr. Cherry was called in and they did some manipulation of the bone?

A. Right.

Q. Then there was subsequently an open operation by Dr. Cherry in the following January, January of 1953? A. Yes.

Q. But before that, in December, he went to work?

A. Yes, he went to work with the cast on his leg, but he couldn't stay.

Q. He went to work with the blessing of his own doctor?

A. He worked just a short time; they gave him a watchman's job, just a watchman's job.

Q. Did you see the wound itself at any time between August and the time he went to work?

A. No, I don't think I did.

Q. Was it in a cast all the time?

(Testimony of Mrs. Florence Morin.)

A. They had it in a cast. They would remove one cast and put on another.

Q. Did they window the cast——

A. They windowed the cast but not right away. When they put on a new cast, he would wear it for a while before it was [47] windowed.

Mr. Harr: I have no further questions.

Q. (By Mr. John D. Ryan): When you talked to Dr. Craig, you relied on what he told you as a doctor, didn't you? A. Yes, sir; I did.

Mr. John D. Ryan: Thank you.

(Witness excused.)

Mr. John D. Ryan: I will call Dr. C. O. Schneider as an adverse witness.

Mr. Luckey: There is no showing that the witness is adverse.

The Court: I will make my own appraisal of that. [48]

DR. CONSTANTINE OTTO SCHNEIDER
produced as a witness on behalf of Plaintiff, and
being first duly sworn, was examined and testified
as follows:

Direct Examination

By Mr. John D. Ryan:

Q. You are Dr. Constantine Otto Schneider?

A. Right.

Q. Are you a medical doctor? A. Yes.

Q. Will you state for our information your edu-

(Testimony of Dr. Constantine Otto Schneider.)

cation, your professional education and qualifications?

A. I graduated from the University of Oregon in 1950. During my senior year, in addition to my last year of schooling, I took a year's internship at the Physicians and Surgeons Hospital. Following graduation, I went to the Ancker Hospital in St. Paul for a general rotating internship and, after leaving St. Paul in June, 1951, I returned to Portland for a year of general surgery, general surgical and medical residency at the Physicians and Surgeons Hospital.

Q. I have some difficulty hearing you. Was your last statement to the effect that you had a residency at the Physicians and Surgeons in 1951 and 1952?

A. That is correct, sir.

Q. What did you do thereafter?

A. After my residency? [49]

Q. After your residency.

A. In July of 1952 I started the general practice of medicine in Portland.

Q. Are you now practicing?

A. I am now engaged in general practice.

Q. On June 10, 1952, what was your occupation?

A. I was a resident in the Physicians and Surgeons Hospital.

Q. What did your duties consist of at that time as a resident of the Physicians and Surgeons Hospital in Portland, Oregon?

A. This residency was primarily directed to surgical training and medical training. Our primary

(Testimony of Dr. Constantine Otto Schneider.)

duties were to assist the surgeons in surgery and to assist the other physicians on the floor in the care of medical patients, particularly in the care of medical patients and to help take care of emergencies as they might arise.

Q. How long had you been a resident on June 10, 1952?

A. I believe, if I remember correctly, my residency started here about the 15th of July, approximately the 15th of July in 1951.

Q. 1951? A. 1951.

Q. Your experience previous to the 15th of July, 1951, was as an intern?

A. Had been as an intern and—— [50]

Q. Where was your internship, here or in Minnesota?

A. At the Ancker Hospital in St. Paul, Minnesota.

Q. On June 10, 1952, did you treat Amos Morin?

A. As I remember, I believe I did do some kind of initial treatment for Mr. Morin.

Q. Do you recall under whose name Mr. Morin was admitted to the hospital?

A. As I remember, he was admitted under Dr. Lee Craig.

Q. Who is Dr. Lee Craig?

A. At that time he was a member of the U. S. Public Health Service in Portland.

Q. At this time, Doctor, would you inform us in detail of your experience in the treating of compound fractures of the lower part of either extrem-

(Testimony of Dr. Constantine Otto Schneider.)
ity, the left or right leg, at that time, June 10, 1952?

A. Prior to the time that I saw this case and for the balance of June, my experience was primarily work undertaken under the supervision of other physicians. I had seen perhaps one or two or three cases where I had observed as they were treated, or helped in treatment of them.

Q. Could you name the very first experience you had and tell what that was?

A. I couldn't state specifically.

Q. In other words, where you had your first experience with a compound fracture. [51]

A. My first experience was as an intern at St. Paul, in the Ancker Hospital, in emergency care, primarily emergency care before the patient was admitted to the hospital.

Q. Were you assisted by anyone at that time?

A. We were assisted by the nurses in that hospital.

Q. That was emergency care? A. Yes.

Q. What did that consist of?

A. Generally an examination and superficial cleansing of the wound, applying splints if necessary, ordering X-rays and possibly writing the initial orders to return the patient to the surgical floor.

Q. That took place in connection with your first experience?

A. As I recall it, that is what our duties were at that time.

(Testimony of Dr. Constantine Otto Schneider.)

Q. Could you recall possibly the next experience of that type that you had?

A. It would be impossible to say exactly. I think it was while I was at Ancker that I had seen, not fractures of this exact type, but I had seen other compound fractures and had taken part in the care of them.

Q. Had you had any other experience other than the one you have told us about prior to June 10, 1952?

A. No, I couldn't specifically say the exact location of [52] the fracture that I helped with, but I can remember one more case. I can't remember whether it was in the lower tibia or the upper tibia.

Q. Did you have one of the upper tibia?

A. I say I cannot remember in that one specific case whether it was the lower or the upper or middle.

Q. That is, the one you described?

A. That I previously described, yes.

Q. Can you recall any specific instance of treating either the upper or lower tibia or any part of the tibia, for the compound fracture?

A. Not specifically. I perhaps might have assisted on some.

Q. That you actually treated and assumed complete treatment of it at the time the patient was brought in? If you had actually treated it and assumed complete treatment, you would recall it, wouldn't you?

A. I believe I would.

Q. I asked you about treating, actually being the

(Testimony of Dr. Constantine Otto Schneider.)

treating physician of this type of injury, prior to June 10, 1952. Would you give us in detail the number of times and occasions upon which you observed the treatment of this type of an injury?

Mr. Harr: For the record, I would like to have it clarified as to just what Counsel means by "this type of injury." [53] Does he mean a compound fracture of the lower tibia, or does he mean a compound fracture——

Mr. John D. Ryan: My question is directed towards compound fractures of the tibia, either the left or right leg. If you care to distinguish between the upper part and the lower part, I am not certain what the definition would be. If you care to do that, to make that distinction, please do so in your answer.

A. I can best answer that by saying in the initial care, the emergency phase, that perhaps prior to this one that I had any actual integral part in treating, perhaps one or two cases, one that I was specifically involved with or that I took part in, and perhaps one more while I was on the emergency service at Ancker Hospital.

Q. You mean the ones you have already described and then this one?

A. Perhaps one more.

Q. By "integral part in the treatment," what do you mean by that?

A. Where I had actually assisted or taken part in the initial emergency care.

Q. What do you deem to be initial emergency

(Testimony of Dr. Constantine Otto Schneider.)

care? What was the initial emergency care in those cases?

A. Treating the patient for shock, trying to immobilize the leg, superficially cleansing the wound, ordering X-rays, [54] placing the patient in a hospital bed, placing the patient where he can be taken care of by whoever is the responsible physician.

Q. Is that the extent of your experience, as you recall it now? A. I believe so.

Q. As of June 10, 1952? A. Yes.

Q. I am not speaking of subsequently.

A. Except I think perhaps one or two cases prior to that time.

Q. Had you had experience in the treatment of any other compound fractures?

A. In the emergency service at Ancker Hospital we got a good deal of them, and also in the surgical service, but I couldn't mention the number of cases specifically. I couldn't say whether it was six or ten or five or what.

Q. Would that be treatment in the emergency room and then sending them up to the surgical floor?

A. It depends on the service. If we are on emergency service, we do the emergency care in the emergency room and then we send the patient to whatever service his treatment required. If we happened to be on the service receiving the patient, we immediately took over the care of that patient on the floor. [55]

Q. As far as the actual treatment and the loca-

(Testimony of Dr. Constantine Otto Schneider.)
tion of these wounds, it was confined to the emergency room?

A. The initial care, yes; the final definitive treatment was always done in the surgical service.

Q. What was your duty on June 10, 1952, at the Physicians and Surgeons Hospital?

A. The duties were, as I outlined before, and apparently, since I had initially examined Mr. Morin, I imagine that I was on the floor at the time and doing emergency work in the emergency surgery there.

Q. You say you imagine. Do you actually recall what took place?

A. I remember being in there at the time Mr. Morin came in or being called.

Q. Would you describe what took place when Mr. Morin came in there on June 10, 1952, at the Physicians and Surgeons Hospital in Portland, Oregon?

A. At the time he was brought in and I was called to the emergency room, I remember primarily the fact that he was having extreme pain. At that time, which was my major contact with this patient, his pain, his major pain, was pain in the back, but he was running a somewhat steady pulse, as I remember. I did the usual check for the possibility of shock—blood pressure, pulse and respiration—and, as I remember, I ordered certain specific medication for pain [56] and for infection.

Q. Do you know what this specific medication consisted of?

(Testimony of Dr. Constantine Otto Schneider.)

A. I believe I ordered morphine for pain and penicillin for the possibility of infection.

Q. You say you treated him for shock. Was he in shock?

A. He was in what I would term incipient shock.

Q. Were you assisted by anyone at this time?

A. I was assisted by a nurse.

Q. What did you then do to the patient?

A. As soon as we had him on the table and had given the medication I described and had done the blood pressure, pulse and respiration and had checked his wound superficially, I tried to determine the extent of his injuries.

On examination we found a couple of small lacerations and a large abrasion in the left leg with palpable crepitus. As I remember, the bone was visible through the wound or wounds.

Q. What do you mean by "palpable crepitus"?

A. By generally feeling, you could feel the scraping, which is typical in any fracture.

We examined him somewhat in reference to his back, but his pain was so severe that we did not want to manipulate it too much at that time.

Q. What did you then do?

A. As soon as we felt he had stabilized somewhat—I [57] would say within 30 or 45 minutes—I ordered—first, after we had cleansed the wound, we examined it to see if there was any gross evidence of any bleeding, and, as I remember it, we washed it with an antiseptic and cleansed it until fairly clean and then applied a dressing and, as I remem-

(Testimony of Dr. Constantine Otto Schneider.)
ber, it was splinted, and the patient was then sent to X-ray within perhaps a half hour or forty-five minutes, for a film of the leg or back.

Q. You say you think it was splinted. What type of splint was used?

A. As I remember, I used a board splint.

Q. What type?

A. There are various types. I think the type of splint, if I remember correctly, that was used was called a Yucca board.

Q. What was the length of the board splint?

A. I couldn't recall exactly offhand.

Q. From your familiarity with splints in general, was it of uniform size? Are they all of uniform size?

A. They can be from two inches long for a finger to six feet long for the back.

Q. Was this one six inches or six feet long?

A. I would say that this splint—I would have to measure—would be between 24 and 36 inches long.

Q. Where did the splint extend? [58]

A. As I remember, it extended to the level of the ankle and to slightly above the knee.

Q. Are you certain you used a splint?

A. I feel positive that I did splint the leg. Whether I splinted it before we had the film or afterwards I couldn't exactly say, but I am positive we splinted the leg.

Q. You are familiar with the records of the Physicians and Surgeons Hospital with regard to this case, is that correct?

(Testimony of Dr. Constantine Otto Schneider.)

A. I have examined them.

Q. You have examined them? A. Yes.

Q. You have been handed Plaintiff's Exhibit No. 1. Are you able to identify those records, from your previous observation of them?

A. I would say that these would constitute probably the entire record. The one you showed me before was a photostat.

Q. The photostatic copy is here, if you would prefer to look at that.

A. No, this is sufficient.

Q. Does that record show what type of splint you used? A. I don't believe it does.

Q. Does the record show you used any splint?

A. I don't believe it does.

Q. Would you read the statement of what was done, in the [59] record that you have here?

A. There is no statement in the record of exactly what was done by me, except as to my initial—

Q. Is there any record there—is that the out-patient record that you have as well?

A. The out-patient record is here, yes.

Q. Do you have before you any record of treatment by you regarding the treatment you have just described? A. Not specifically.

Q. What does it show regarding it?

A. It says here, "Morphine gr. $\frac{1}{6}$ for pain at 1:30 p.m.; compression dressing to left lower leg; Abbocillen 800,000; catheterized, specimen to laboratory; admitted to Room 115."

Q. Does the record which you have had an op-

(Testimony of Dr. Constantine Otto Schneider.)
portunity to look at show at any place what you actually did to this patient?

A. Nothing except my initial orders.

Q. That description you have just read, indicating the morphine and bandaging? A. Yes.

Q. Do you know who made that entry?

A. I do not.

Q. Who would normally?

A. The nurse on duty might make it; ordinarily, of course, I myself or the physician—— [60]

Q. Do you customarily make a notation or record of your treatment of a patient as received in the emergency room? A. Ordinarily.

Q. Did you in this instance?

A. Apparently I did not.

Q. You are, therefore, depending exclusively upon your memory as to what took place June 10, 1952, with regard to the treatment?

A. To the best of my recollection.

Q. You have looked through that record and you cannot find in that record any statement of what your treatment was? A. Not specifically.

Q. Is there any statement at all which would indicate what your treatment was?

A. My initial orders.

Q. What are they?

A. After the patient was sent to bed, they are the initial orders that were written, and that is about the extent of my entries.

Q. What is the extent of your recollection, that

(Testimony of Dr. Constantine Otto Schneider.)

you externally cleansed these wounds with a mild saline solution?

A. A sterile saline solution.

Q. You then opened the wound?

A. Yes. [61]

Q. You believe you put a splint on the wound, the nature of which you cannot certainly recall?

A. Not offhand.

Q. The hospital record itself only indicates bandaging, is that correct?

A. It says "compression dressings," which is different than an ordinary bandage.

Q. Compression dressings to the lower left leg?

A. Yes.

Q. Penicillin, 800,000 units. Would you describe the type of compression dressings you put on?

A. A compression dressing consists of dry, sterile dressing applied directly over the wound; then the entire leg is wrapped in what we call compression cotton, which is a heavy, bulky cotton, you might say; the compression cotton is thoroughly wrapped on and then Ace bandages applied to maintain compression of the leg, to prevent bleeding and to prevent swelling.

Q. If you do use a splint in a situation like this, would you normally make a notation of the use of a splint in your description of what was done?

A. Ordinarily.

Q. I notice on the out-patient record—have you that in front of you? [62]

A. Yes.

Q. It indicates under the words "insurance

(Testimony of Dr. Constantine Otto Schneider.)
case" the letters "USPH." A. Yes.

Q. You have stated the patient was entered under the name of Dr. Craig. Did you know of your own knowledge whether Dr. Craig was a physician and surgeon?

A. At that time I believe Dr. Craig was a physician of the Public Health Service here in Portland.

Q. Did you notify Dr. Craig of the presence of the patient at the hospital?

A. I believe I did phone him.

Q. When did you telephone him?

A. As I remember it, I telephoned him shortly after I had made my initial examination.

Q. Was that prior to the time you cleansed the wound externally?

A. No, I believe it was after.

Q. To your knowledge, did you notify Dr. Craig what you had done?

A. As I remember it, I told him what we had found on superficial examination and what was suspect; what we had found and what was done, and suggested that we send the patient to X-ray.

Q. What did you tell him you found out? Specifically what did you say? [63]

A. I can't remember my exact words, but I believe I notified him he had a compound fracture of the left lower leg and I believe there was a back injury present.

Q. That there was a back injury?

A. A back injury, yes.

Q. What did Dr. Craig inform you?

(Testimony of Dr. Constantine Otto Schneider.)

A. As I remember, he suggested that we go ahead with the X-rays and contact Dr. Leonard.

Q. In your position as resident you have stated it was your duty to see people in an emergency and give them such emergency treatment as you could. Was it your duty also to notify the doctor in whose name the patient was admitted? A. Oh, yes.

Q. Were there limits to your right to treat a patient?

A. Well, you mean my right to carry on treatment? Well, certainly, my treatment was confined to an emergency. It would be necessary in an emergency to give the same sort of treatment that anyone who sees a man with a fractured leg would be entitled to give.

Q. You deemed this to be an emergency?

A. I deemed that to be an emergency.

Q. You deemed the treatment you gave to be emergency treatment?

A. Well, initial care, emergency care.

Q. When would you say that emergency [64] ceased?

A. I would say, as far as I was concerned, my personal responsibility, perhaps when I phoned Dr. Craig.

Q. That was the end of your responsibility?

A. The emergency was not over, but that was when my initial care ceased.

Q. Dr. Craig had been informed of the patient's condition and your emergency care ceased?

(Testimony of Dr. Constantine Otto Schneider.)

A. I would have continued my care under his direction.

Q. Did you do so in this case?

A. In this case, yes.

Q. What did he direct you to do?

A. As I remember it, at the outset, to start to go ahead and have the X-rays made, admit the patient to the hospital ward and, as I remember it, he told me to call Dr. John Leonard.

Q. Where was Dr. Craig when you called him?

A. As I remember—I couldn't say exactly, but it seems I called him at the office.

Q. Did Dr. Craig come to the hospital on June 10th, to your knowledge?

A. I couldn't answer that.

Q. Can you look at the clinical record that you have? A. Yes.

Q. Would it indicate Dr. Craig did come to your hospital on June 10th? [65]

A. I see no entry on the 10th.

Q. Can you tell from looking at the records when Dr. Craig first appeared as shown by the hospital records?

A. The first entry made directly on the chart is on the 11th, the morning of the 11th.

Q. Can you recall the time when Mr. Morin was brought to the hospital?

A. I recall seeing Mr. Morin, and it was shortly after lunch, as I remember.

Q. Would you use the records there to refresh your recollection?

(Testimony of Dr. Constantine Otto Schneider.)

A. It may have been at 1:15 p.m.

Q. You testified you notified Dr. Craig by telephone as soon as you had completed the emergency treatment?

A. I said I believe I did.

Q. How long did this emergency treatment take?

A. I would say 30 to 45 minutes.

Q. The patient was then taken to X-ray?

A. Shortly after that he was taken to X-ray.

Q. Then where was he taken?

A. After that he was admitted to a bed in what was then Room 115.

Q. Did you continue to attend the patient throughout the night of the 10th of June?

A. I believe Dr. Stalder was on call that night, as I [66] remember.

Q. Please refer to the exhibit which you have in your hand. Would you look at the doctor's order sheet, which is one of the sheets of the exhibit?

A. Yes.

Q. You will see "Name: Mr. Amos Morin; Room or Ward No.: 115; Bed: 8; Hospital No.: 97614; Doctor: Craig."

A. Yes.

Q. Are those orders marked down as of "6/10/52" orders given by you?

A. Yes.

Q. Is that your signature (indicating)?

A. That is mine.

Q. What was the purpose of No. 1, Penicillin?

A. The purpose of the penicillin was to allay possible infection, which is done in any wound of this kind or any other open wound.

(Testimony of Dr. Constantine Otto Schneider.)

Q. As to the remaining five orders, can you inform us as to why you gave those orders?

A. The second order is for morphine sulphate, for pain, given to help allay shock. In this particular case I ordered a complete blood count and, to avoid shock, I ordered that they have blood available. Sedation was indicated and I ordered Sedamyl. I ordered Deprapanex, 4 cc's, intermuscular. That is a gentle bowel stimulant, given to allay ileus. I ordered general diet as tolerated but none until Dr. Leonard [67] gives his OK.

Q. I notice "but none until Dr. Leonard gives OK." In your conversation with Dr. Craig did he ask you to notify Dr. Leonard or did he say he would notify Dr. Leonard?

A. As I remember, I believe that he asked me to call Dr. Leonard.

Q. Did you do so?

A. I believe I talked to him after we sent the patient to X-ray.

Q. Who is Dr. Leonard?

A. Dr. John D. Leonard was or is a surgical consultant to the U. S. Public Health Service in Portland.

Q. What would be his customary duties on June 10th, 1952, as surgical consultant?

A. I am not aware of his exact duties, but I would assume his duties would be to take over on the case if he were asked by the U. S. Public Health Service.

Q. Did you call Dr. Leonard?

(Testimony of Dr. Constantine Otto Schneider.)

A. I believe I did call him that afternoon. I can't remember exactly whether I called him or whether Dr. Craig did.

Q. Does the record of the hospital that you have there show that a call was made to Dr. Leonard?

A. No, it does not.

Q. Do you recall talking to Dr. Leonard? [68]

A. I say I can't recall exactly whether I talked to him or whether Dr. Craig talked to him, but I think I did.

Q. Have you, since that time, asked Dr. Leonard if you called him? A. I have not.

Q. You have under "3"—"Match STAT." You have indicated the cross-matching of blood for possibility of shock. Does the hospital record indicate you had to give plasma or whole blood for shock?

A. I believe none was given.

Q. That was never given? A. No.

Q. When was the next time you saw the patient after giving these orders which are on the doctor's order sheet?

A. I saw him several times during the day, and Dr. Stalder did, too. We saw him again at 3:00 o'clock.

Q. That afternoon?

A. Yes. Dr. Stalder saw him again at 5:45.

Q. You are reading from the orders of the 11th?

A. No, I am looking in the nurse's notes.

Q. The bedside notes regarding Amos Morin?

A. Yes.

Q. For the month of June, Dr. Craig?

(Testimony of Dr. Constantine Otto Schneider.)

A. Yes.

Q. Had there been any essential change in the condition of [69] the patient at any of these visits?

A. Initially, his pulse was not elevated and during that particular phase there was no appreciable change, apparently.

Q. Following on down, can you tell us the next time you had reason to see the patient?

A. I myself?

Q. Yes.

A. By specific notes, my next visit to the patient, I believe, was at 4:45 the next day.

Q. 4:45 on June 11th? A. Yes.

Q. 1952? A. Yes.

Q. 4:45 in the afternoon? A. Yes.

Q. Are you able to indicate or advise us, between those times, whether Dr. Craig called upon the patient and when he called upon the patient, as shown by the record?

The Court: Recess until 2:00 oclock.

(Noon recess.) [70]

(Court reconvened at 2:00 o'clock p.m. Wednesday, July 21, 1954, pursuant to recess, and further proceedings herein were had as follows.)

(Last question read.)

A. According to this record, I find that Dr. Stalder and Dr. Craig saw the patient, I would

(Testimony of Dr. Constantine Otto Schneider.)
estimate, at 8:30 on the morning of June 11th, per the record.

Q. That information is in the nurse's notes?

A. Yes.

Q. Is it customary for a nurse to enter a note of the visit of a doctor when he sees a patient?

A. When she is in attendance at the patient's side, yes.

Q. Is it customary for a doctor to enter a note on the chart that he had seen the patient?

A. Not necessarily.

Q. Reviewing the bedside notes and the doctor's order sheet and the remainder of Exhibit No. 1, was any further treatment done or given to the actual wound other than the treatment given by you as described during the patient's stay in the hospital?

A. To the best of my ability and knowledge, I would say no.

Q. You have reviewed Exhibit No. 1 both now and before this trial?

A. I see no further reference.

Q. Does the record or your recollection of the case permit [71] you to say whether the patient was actually in shock at any time during his stay?

A. I feel he was in what we speak of as incipient shock. The reason for saying that is a clinical impression. There is no set rule for shock. It is a clinical impression that one gets from seeing a patient.

Q. With reference to the medication given,

(Testimony of Dr. Constantine Otto Schneider.)

Deprapanex, for ileus, will you state for the record what ileus is?

A. We speak of ileus as loss of relaxation of the bowels, bladder, and organs of that type. It causes loss of function, lack of function, and distention, and, in Mr. Morin's case, it resulted in the necessity of catheterizing at frequent intervals and things of that sort.

Q. At the time he came into the emergency ward, the emergency treatment room, would you say that ileus was impending or that he was actually suffering from it?

A. I would say it is impossible to say how long after the initial injury it would take for the ileus to develop, but I believe we first noted the onset of the ileus in relationship to the necessity for catheterization.

Q. Would you be able, from your own memory or from the records you have before you in Exhibit No. 1, to state when that was?

A. He was initially catheterized about 10:30 that evening.

Q. 10:30 that evening? [72]

A. Yes, at least as shown by the notes.

Q. You have testified you externally cleansed the wound with this sterile saline solution, and that you then bandaged the wound and, to your recollection, you applied a splint. Is that a fair statement of what you did?

A. That is correct, except I am not positive that I applied the splint at that time or after the X-rays

(Testimony of Dr. Constantine Otto Schneider.)

were taken, but I am sure I applied a splint to that man. That is customary.

Q. Did you debride the wound?

A. I did not.

Q. I beg your pardon? A. I did not.

Q. Did you close the wound—

A. No, I didn't.

Q. —with sutures in any way?

A. No, I didn't.

Q. Did you attempt to reduce the fracture?

A. There was no evidence at the time that the fracture needed reduction.

Q. Did you clean the bones?

A. No, I didn't. The bone was not protruding, to the best of my recollection.

Q. Doctor, you have been handed Plaintiff's Exhibit No. 3, which is the clinical record of the U. S. Public Health Service, Marine Hospital, in Seattle. Is that correct? [73]

A. Yes, that is correct.

Q. Do you recognize that record?

A. I have never seen it before.

Q. You have never seen it previously?

A. No.

Q. Would you be kind enough, Doctor, to turn to the narrative statement of treatment?

A. The narrative summary?

Q. The narrative summary, I believe that is what it is called. A. Yes.

Q. Would you read therefrom, if you can, the

(Testimony of Dr. Constantine Otto Schneider.)
description of the laceration and the wound? Read it out loud, if you will.

A. Extremities: There was a laceration—do you want the whole thing?

Q. Yes.

A. "Physical examination: The patient is well developed, well nourished white male, who is in a semi-comatose state, probably due to narcotics and barbiturate was given and transportation. Pupils were equal but myopic. No response to light. Lungs clear to percussion and auscultation. Heart negative. Abdomen was rigid and slightly distended. Both stasis were hyperactive; there was no tenderness. Extremities: [74] There was laceration approximately a 12 cm. long and 4 cm. wide over the anterior mid shin, left with proximal bone fragment out through the wound. There was considerable dried blood around laceration with rather strong odor but no gross infection noted."

Q. Would that description of the wound be the same as your recollection of the wound?

A. I would say it would not.

Q. Would you say the wounds were larger than you recall?

A. In my recollection, there were two small wounds, the largest perhaps at the very most being two inches long.

Q. Was the bone protruding at the time you examined it?

A. Not at the time I had examined it.

(Testimony of Dr. Constantine Otto Schneider.)

Q. Would you turn to the summary of the operation, the first operation?

Mr. Page: Page 11.

Q. (By Mr. John D. Ryan): Is that the one?

A. That is it.

Q. Would you read the title of it? What is the title, for identification of what you are reading?

A. This is the "Operation Report" from the "Clinical Record."

Q. Is there a date there?

A. Dated 6/16/52. [75]

Q. Is there a date upon which the operation was performed?

A. The date of the operation, yes, 12th of June, 1952.

Q. The 12th of June, 1952. At what time, please?

A. 3:03 p.m.

Q. Will you read the description following the words "What Was Done" in that summary of the operation at the United States Marine Hospital in Seattle?

A. "What Was Done: The region of the lacerations, one about 1½ inches long and the other an inch long, was thoroughly scrubbed with soap and water, followed by a tincture of zepharin prep. With the leg draped the wound was gently irrigated with normal saline poured in from above and also through a bulb syringe inserted in about the fracture site. The clotted blood was removed from the region of the fracture with the finger inserted through the wound and the ends of the fracture

(Testimony of Dr. Constantine Otto Schneider.)

checked for adventitious tissue interposed over the fracture ends. With the leg supported in the Roger Anderson table with a sling under the knee and another sling attached to the ankle, traction was applied until the fragments which were overriding approximately one inch were brought into apposition. Traction was then released and with the position maintained as checked by palpation of the fractures the skin [76] wounds were sutured with simple and vertical mattress sutures of 00 cotton. Incomplete closure resulted because of the marked swelling of the tissues. However, the bone itself was covered. Sterile 4-by-4's were applied. The blebs were opened and the surface component excised and the base scrubbed with tincture of zepharin, after which sterile 4-by-4's were applied over these sites, also. The leg was then fixed with a plaster cast, well padded, extending high into the groin."

Q. Does that description of the wound, as given there, correspond with your observation of the wound?

A. As I remember, in addition to the two lacerations, there was a large abrasion in there.

Q. Was the bone visible at the time you saw the wound?

A. It was visible by separating the wound edges, as I remember.

Q. You were the resident at Physicians and Surgeons Hospital in Portland, Oregon, on June 10, 1952?

A. Yes.

(Testimony of Dr. Constantine Otto Schneider.)

Q. What was your duty with relationship to patients of the U. S. Public Health Service when brought to the hospital?

A. They were the same as they were with any patient that was brought to the hospital. If there was an emergency status, something that required immediate attention, we tried to give [77] that emergency service as we would with any case, and if they were cases that were sent in covered by orders to be signed by the physician, then of course we did what we could.

Q. Did you get any direction of the physician under whose name the patient was entered?

A. Yes.

Q. In this case that physician was Dr. Craig?

A. That is right.

Q. He was with the U. S. Public Health Service at that time? A. Yes, that is right.

Q. I don't know whether I asked you this, but what was the type of fracture Mr. Morin had when you saw it? A. When I saw it?

Q. Yes, on the left lower leg.

A. I have not seen the X-rays since that time. As I remember, he had actually three fractures. He had a compound fracture of the left tibia; he had a compound fracture of the left fibula and, as I remember, he had a second fracture of the tibia.

Q. Is that confirmed by the hospital records?

A. I don't know.

Q. As resident physician at the Physicians and Surgeons Hospital in Portland at this time, June

(Testimony of Dr. Constantine Otto Schneider.)

10, 1952, did you feel fully competent to give the initial treatment required at the time of an [78] injury?

A. I would have preferred to have had some experienced surgeon working with us. I felt it was my responsibility, once I felt shock might be imminent——

Q. My question is: Would you have preferred to have had a more experienced surgeon with you?

A. Of course, it wasn't for training purposes we were there——

Q. I appreciate your answer, but would you have preferred to have had a more experienced surgeon work with you on this type of case?

A. I believe that would be logical for anyone, sir.

Q. Did you believe that this was a critical emergency?

A. By "critical" that it would terminate the patient's life? Probably not.

Q. Do you consider that this area of the left tibia is a critical area when it does have a compound fracture?

A. It sometimes is a little more difficult to handle.

Q. How would it apply to Mr. Morin, who was 42 at the time?

A. I believe you would have to ask an expert witness.

Q. In other words, you cannot answer that?

A. I am not qualified.

(Testimony of Dr. Constantine Otto Schneider.)

Mr. Harr: Speak louder, please. I find it difficult to hear.

A. I believe you should ask an expert witness. I am not here as an expert witness in this field. [79]

Q. (By Mr. John D. Ryan): I do not see any reason why you cannot answer it, Doctor, if you have the knowledge?

A. I am a general practitioner. I am not an orthopedic surgeon.

Q. Do you know anything about the lower left tibia? A. A little.

Q. Do you know anything about a compound fracture of the lower left tibia? A. Yes.

Q. If you found a wound within an hour of the time you had reason to know that a man had suffered a bone fracture, a compound fracture, I should say, of the lower left tibia, with all the other attendant injuries that you have noted here, would you then consider it a critical area for infection?

A. If it were a case of my own at the present time—you are asking my opinion now, not as of that time?

Q. I am asking your opinion as of that time. If you want to answer it as of now, you are free to do so.

A. In these particular cases in my particular status in the medical profession, I always have consultation.

Q. Then your answer is you would have preferred to have had consultation in this type of a case? A. If it were my own case.

(Testimony of Dr. Constantine Otto Schneider.)

Q. Would you have preferred to have had that consultation [80] immediately when you began the treatment of the patient or at some time later?

A. I feel in this particular case that consultation would be of no value over and above perhaps helping guide the course of the initial procedures.

We had attempted to control shock, which we feel we did. We had ordered X-rays. We had done the initial cleansing of the wounds. We had given antibiotics to prevent infection. We had immobilized the leg. That is just about all you can do in a case of this sort until such time as his condition——

Q. You are familiar with the Physicians and Surgeons Hospital, familiar with their facilities for full treatment of this man's condition?

A. Absolutely.

Q. Is it a Grade A or first-class hospital in the community? A. Yes.

Q. There are cases of this type treated there?

A. Frequently.

Q. To your knowledge, at this time was there expert consultation available for this type of case if you had cared to seek it? A. Yes.

Q. Would it have been available then within six hours or eight hours? [81] A. Oh, yes.

Q. From the time you saw the patient?

A. Yes.

Q. Was such expert consultation sought, to your knowledge?

A. I couldn't say, sir. After I called the

(Testimony of Dr. Constantine Otto Schneider.)

U.S.P.H. and wrote my initial orders, then I considered my responsibility in the case ended.

Q. You have the chart there still?

A. Which chart, the Public Health?

Q. Yes. Has that been taken from you?

A. No.

Q. Plaintiff's Exhibit No. 1. Does that show that expert consultation was sought at any time? Does the chart reveal that?

A. It shows that on the morning of June 11th at approximately 11:00 o'clock that Dr. Leonard had seen the patient.

Q. You admit Dr. Leonard was the type of consultation, expert consultant, you could call in?

A. He has seen a good deal of them.

Q. What kind of an expert consultant would be required?

A. Generally speaking, perhaps someone in general surgery or an orthopedic man, either one. Both of these specialists do orthopedic work.

Q. Do you have knowledge of what Dr. Leonard's specialty is? [82]

A. He is in general surgery.

Q. And he saw the patient on June 11th?

A. Yes.

Q. At what time of day?

A. At 11:00 o'clock.

Mr. John D. Ryan: That will be all.

(Testimony of Dr. Constantine Otto Schneider.)

Cross-Examination

By Mr. Harr:

Q. You say Dr. Leonard was not the type of doctor you had in mind, when you said it would have been better if you had consultation?

A. I think he would be fully qualified, yes.

Q. Fully qualified? A. Yes.

Mr. Harr: Would you hand the witness Plaintiff's Exhibit No. 3, the one he just had? We are referring to these as exhibits. I presume we may offer them all subject to whatever objections we may want to make.

The Court: They are all deemed received in evidence subject to any objections previously made or objections that may hereafter be made prior to the submission of the case.

Introduction of Exhibits

(The following exhibits were thereupon received in evidence:) [83]

Plaintiff's Exhibits

Description

No. 1—Photostatic copy of record of treatment of Amos Morin at Physicians and Surgeons Hospital, June 10 through June 12, 1952.

Nos. 2-A & 2-B—X-rays of Amos Morin taken at Physicians and Surgeons Hospital, June 10, 1952.

No. 3—Photostatic copy of hospital record of

(Testimony of Dr. Constantine Otto Schneider.)

Amos Morin of United States Marine Hospital, Seattle, Washington.

Nos. 4-A to 4-J—X-rays of Amos Morin, United States Marine Hospital, Seattle, Washington.

Nos. 5-A & 5-B—X-rays dated 8/19/52—Dr. Thorup.

No. 6—Hospital record of Amos Morin at Providence Hospital, Portland, Oregon.

No. 7—X-rays of Amos Morin, Providence Hospital, Portland, Oregon.

No. 8—Hospital record of Amos Morin, St. Vincent's Hospital.

No. 9—X-rays of Amos Morin, St. Vincent's Hospital, Portland, Oregon.

No. 10—Hospital record of Amos Morin, United States Veterans Hospital, Portland, Oregon.

No. 11—X-rays of Amos Morin, United States Veterans [84] Hospital, Portland, Oregon.

No. 12—Record of history of treatment of Amos Morin by Dr. Howard Cherry.

No. 13—Campbell's Operative Orthopedics, Volume I, C. V. Mosby, St. Louis, 1949.

No. 14—Pictorial Handbook of Fracture Treatment, Compere-Banks-Compere, The Year Book Publishers, Inc., Chicago, Illinois, Second Edition.

No. 15—Deposition of Lee A. Craig as an adverse witness.

No. 16—Deposition of Constantine Otto Schneider.

No. 26—Statements covering plaintiff's doctor and hospital charges.

(Testimony of Dr. Constantine Otto Schneider.)

Defendant's Exhibits

Description

No. 17—Specimen of bone chips, 7/11/52.

No. 18—Payroll and employment records, Dredge Wahkiakum.

No. 19—Textbook of Surgery, Christopher.

No. 20—U.S.P.H.S. Out-Patient Clinical Records.

Nos. 21-A & 21-B—U.S.P.H.S. X-rays, November 12 and 26, 1952.

No. 22—Attorneys' Textbook of Medicine, Roscoe N. Gray, M.D.

Nos. 23-A to 23-E—X-rays taken by Dr. Berg.

No. 24—Report and Office Memorandum of Dr. Warren C. Hunter. [85]

No. 25—Office Notes and Memorandum of Dr. Richard Berg.

Mr. Harr: We do have some medical textbooks, your Honor, which we perhaps may not want to leave and if we do want certain parts of the books in evidence, we can have them photostated and supplied later.

Q. Would you then refer to Page 11? You read from that particular page, but you did not read it all.

Mr. John D. Ryan: Page 11?

Mr. Harr: U. S. Public Health Service Records.

Q. Have you found it? A. Yes.

(Testimony of Dr. Constantine Otto Schneider.)

Q. The first paragraph is headed "What Was Found." A. Yes.

Q. Do you have that before you? A. Yes.

Q. I will ask you if the record says this: "The blood encrusted dressings and splints were removed * * *." Is that the language? A. Yes.

Q. That is just part of it? A. Yes.

Q. So, when the patient got to the Marine Hospital, in Seattle, there were dressings and there was a splint. As far as you know, there were no other doctors at the hospital that [86] did any bandaging or putting on of splints other than what you did?

A. To the best of my knowledge, that was all.

Q. You were the only one who performed any of those functions? A. Yes.

Q. Let us go back to the first part of your testimony. I would like to know a little bit about your background.

Ancker Hospital in St. Paul, is that a Class A hospital? A. Yes.

Q. Do they handle a large amount of emergency surgery? A. A great deal.

Q. Is it a modern hospital?

A. Very modern.

Q. Can you compare it to any hospital in Portland as to size and equipment?

A. About twice as big as almost any of the general hospitals in Portland that are available to the public; it is an 840-bed hospital that covers all services. The emergency service receives all emergencies from the entire City of St. Paul and Ramsey

(Testimony of Dr. Constantine Otto Schneider.)
County. The emergency service is probably the biggest in the city and probably equivalent to that of Minneapolis General in Minneapolis.

Q. You were there in the hospital as an [87] intern? A. That is right.

Q. How long was your internship?

A. One year.

Q. During the course of that time, as you have testified, you were in the emergency surgery?

A. Yes.

Q. Approximately how long were you in the emergency surgery?

A. As I remember, I believe it was a full 30 days that we have to put in.

Q. I presume you received, then, a lot of injuries, people involved in automobile accidents and more or less seriously injured people?

A. Yes.

Q. Including patients with bone injuries?

A. Yes.

Q. Fractures? A. Yes.

Q. Some compound fractures, perhaps?

A. Yes.

Q. Back fractures? A. Yes.

Q. When you said this morning you had personal knowledge of having taken an active part in one or two compound fractures of that type——

A. Yes. [88]

Q. There were other compound fracture cases you participated in? A. Yes.

Q. You didn't say, but I presume that while you

(Testimony of Dr. Constantine Otto Schneider.)

did not participate in treating other fractures, you were there and observed, is that correct?

A. That is right.

Q. Of course, in a hospital of that size they would have a great number of very highly skilled orthopedists and general surgeons? A. Yes.

Q. That you worked with and watched?

A. Yes. Training was under the University of Minnesota Medical School in that hospital.

Q. Was the treatment you followed in this instance comparable with the treatment you saw in connection with similar injuries while you were there in Ancker Hospital?

A. I believe the treatment that I gave this patient would be entirely comparable to that.

Q. State whether or not in your opinion a crushing fracture of the first lumbar vertebra is or is not a very serious injury?

A. In my opinion, I believe it is probably—I believe it probably far supersedes almost any type of fracture injury except perhaps a skull [89] injury.

Q. What was your first consideration? What was the thought you had in mind when you examined this man and felt it was your obligation and responsibility to give the primary treatment? What was the first consideration you had in mind?

A. I think my primary consideration in this case was to relieve his pain because the patient was extremely disturbed and complaining a great deal

(Testimony of Dr. Constantine Otto Schneider.)
of pain in the back, and alleviation of pain of course controls shock.

Q. You would say, then, his general condition was the first thing to be considered?

A. Yes, sir.

Q. In considering the general condition, what would be the danger signals that flashed before your mind that might develop in a situation, a condition that this man had, with a fractured back and serious leg injury?

A. Of course my primary care was shock because death can result from shock. My secondary consideration was the possibility of a back fracture which might result in dissection of the cord and, therefore, a complete paralysis.

Q. Is paralysis of the bowels usually or customarily an aftermath of a compression fracture?

A. In my experience it almost invariably results.

Q. In other words, that is an ileus?

A. An ileus. [90]

Q. Did it come about as you had anticipated?

A. Yes.

Q. There was a nurse in attendance at the time Mr. Morin came to the Physicians and Surgeons Hospital?

A. Yes, sir.

Q. One of the first things you did was to administer some morphine?

A. Yes, sir.

Q. Is the morphine cabinet in the surgery, in the room where you performed your surgery?

A. No, sir.

(Testimony of Dr. Constantine Otto Schneider.)

Q. What must be done to obtain access to the morphine so that you may have it administered?

A. At the time I was resident the morphine was kept under the direct supervision of the nurses' supervisor on that floor and any nurses who were given orders to give morphine had to go to the supervising nurse's office to get that morphine.

Q. What about penicillin?

A. I believe at that time—I am not quite positive—that while I was resident there we started a medication drawer in the emergency room. I don't know whether that was functioning at that time or not, but initially when we first went there we had to go to the nurse's office to get penicillin from there. Whether they were still doing it at that time or [91] whether we had this medication in the emergency room in a locked drawer, I can't say.

Q. You testified about irrigating the wound and giving it some cleansing. Do you have any personal recollection that a nurse was in the room at the time you gave that treatment?

A. I don't know. We were pretty busy.

Q. Do you have any recollection of the number of people that went in and out of the surgery and the patients you personally had to treat and care for?

A. I couldn't say. I imagine we got in that hospital between 100 and 110. The emergency service at that particular hospital varied a great deal. They didn't get much in the way of city cases in that hospital for emergency care, because it is a small hos-

(Testimony of Dr. Constantine Otto Schneider.)

pital. I couldn't estimate, but I would say we would probably run anywhere from perhaps 6 or 8 up to 20 in the emergency room on various days.

Q. And then perhaps 100 or more in the hospital? A. In the hospital, yes.

Q. I think when your deposition was taken you made some comment that there was no rule that when a person is given emergency treatment that you had to make any notation. Is that correct?

A. It is customary, but as far as I know there is no specific law or rule that says one has to be made, or anything. [92]

Q. Or to make charts, do you know about that?

A. I think there has been a record made on all cases, but I can't say definitely. Ordinarily in a case where a patient is admitted to a hospital from an emergency room there is no emergency record made, because that is usually incorporated in the total records which in this particular case I did not write, the admittance note.

Q. Can you account for the fact you did not write that? I think you said once you tried to do that very thing.

A. We try to write as many as we can, but at times we get too busy and do not get an opportunity to go back and catch up on notes, and that quite possibly could have happened here.

Q. When Mr. Morin came into the emergency room, you made a cursory examination, and you heard Mrs. Morin this morning testify that you said you were going to have to cut his trousers. Do

(Testimony of Dr. Constantine Otto Schneider.)

you remember about that? Do you remember about cutting his trousers?

A. I can't remember, frankly, whether we took them off or cut them off. I can't remember.

Q. Then you testified as to the detergent and mild antiseptic used. In what area or over what area did you use that antiseptic and detergent?

A. I used that around the area immediately surrounding the open wound, and then attempted to wash out any bacteria or [93] contamination that might be present.

Q. Do you have any recollection as to whether or not it was bleeding?

A. I think there was minimal bleeding at the time I saw it. There was blood present, as in any wound, but at that time, as I remember it, it was quite minimal.

Q. In your experience, if you find an area of the sort that has been described, you are concerned with contamination that might get into the wound? Is that correct?

A. If it is bleeding, then you have to scrub it and if something is scrubbed there is necessarily a contamination.

Q. After you used the antiseptic and detergent around the wound, then what did you do to it?

A. As I remember, we applied a dry sterile dressing.

Q. Well, before that?

A. As I remember it, we cleaned the abrasion.

Q. You first cleaned the abrasion?

A. Yes. Then we poured some of the saline solu-

(Testimony of Dr. Constantine Otto Schneider.)

tion, as I remember it, all over the wound in an attempt to clean it; that is to wash out any dirt or bacteria that might be present. After it was thoroughly cleaned, then we applied a large compression dressing over it.

Q. Counsel asked you something about excising the wound or about debridement.

A. By strict definition, debridement involves removing of [94] foreign matter and excision of all the tissues immediately surrounding the wound, after you irrigate the wound and wash the dirt out of it.

Q. Was there any such tissue in this case, as far as you recall, that needed to be excised?

A. To the best of my recollection, no, there wasn't. I couldn't find any. The wounds were small, and there didn't appear to be any.

Q. As to the dressings you put on there, you said you put a compression dressing and then you put on some Ace bandages? A. Yes.

Q. Does that have any tension to it or——

A. It is slightly elastic.

Q. How many bandages of that kind did you put on?

A. I couldn't recall exactly. I would say perhaps in an area that large perhaps two, maybe three.

Q. Reading from the nurse's notes, I see that there is a notation there of three packages of compression cotton, four three-inch Ace bandages and one six-inch Ace bandage.

A. That could very well be the coverage, apparently.

(Testimony of Dr. Constantine Otto Schneider.)

Q. You told me personally, Doctor, a while ago when I was talking to you about your recollection of the size of those bandages to bandage the leg when he left the emergency surgery. Would you indicate with your hands, as you recall, the size so the Court can see? [95]

A. I would say the bandage altogether was approximately that big (illustrating) around over his entire leg.

Q. Why did you feel it necessary to put on such dressings and to splint it as you did?

A. I wanted—the patient was a little bit or quite a little disturbed and I wanted to immobilize the leg to prevent further damage.

Q. Did you have in mind at that time that, in all likelihood, there would be no further surgery or that there might be surgery in the case?

A. Well, I can't really state, sir, because as far as further surgery was concerned, just from my own personal opinion of the patient's condition at that time, I would say it indicated immediate emergency care, but I had no further responsibility in making any decision in that case.

Q. You then sent him to X-ray? A. Yes.

Q. And then to bed? A. Then to bed.

Q. Was he put in an extension on the bed?

A. Yes; when we sent him to bed we had the leg elevated on pillows to help control the swelling and bleeding, and we had to place him in such a position that the back was in what we call hyperextension. It can be elevated—the bed, I mean—in that way,

(Testimony of Dr. Constantine Otto Schneider.)
or you can place a blanket or something under [96]
the patient's back.

Q. What is the purpose of that extension?

A. Generally, patients with compression fractures, the spine is placed in hyperextension to help prevent any possibility of bad effects on the spine.

Q. Would it also tend to pull that compression fracture—to pull it back to its proper shape?

A. It would; it would probably tend to help.

Q. On direct examination you testified you called Dr. Craig and that your recollection was that you also talked to Dr. Leonard. You do recall that Craig told you Dr. Leonard would be brought into the case, is that correct?

A. I believe so. That is what he stated.

Q. Should consideration in a case like this be given to not aiding the distress at the outset by taking a man to regular surgery to reduce his fracture and giving him an anesthetic? Is that a consideration which doctors take into account, the complications of surgery?

A. Most surgeons fear shock under general anesthesia. The patient was, in my opinion, at that time in impending shock or incipient shock, and anesthesia would not be indicated at the time I examined him.

Q. I notice, in looking at the hospital chart, it shows the temperature went from 99 at the time of admittance up to 100.2—that would be 99.2? [97]

A. Approximately.

Q. I notice, also, that his pulse went from 84

(Testimony of Dr. Constantine Otto Schneider.)

upon admittance to 112 the morning of June 11th.
Is that correct?

A. Yes; by the record, that is right.

Q. Does that pulse rate have any significance?

A. I believe it does, sir. All the major textbooks on surgery that I have read indicate that one of the first indications of impending shock is a rise in the pulse rate, rather than a fall in pressure, the fall in pressure coming later.

Q. By looking at the chart, from the time of admittance until the pulse rate reached 112, the graph shows a straight line up, doesn't it? A. Yes.

Q. Would you have considered it good practice to have taken such a man direct to surgery and given him a general anesthetic, a man that was in that serious condition?

A. I think that someone more specialized in surgery than myself would be more qualified to answer that question.

We did have blood ready in event of shock and had made preparations which we felt were necessary to forestall shock, but I do not feel qualified to answer that question as to the possibility of shock.

Q. Do you know from your experience or from observing others [98] handling cases of this kind, or authorities that you have read, whether or not the administering of a general anesthetic would have increased the likelihood of shock?

A. Textbooks on surgery specifically set forth one of the causes of surgical shock is general anesthesia, or can be, I should say.

Q. Turning over to the bedside notes, Doctor,

(Testimony of Dr. Constantine Otto Schneider.)

the nurse's bedside notes show his blood pressure between 3:00 and 4:00 o'clock at 140 over 88. Then I see they administered under your direction Dromaron. A. Yes.

Q. What was the purpose of that?

A. The patient at that time was still complaining—in spite of the fact that he had already had narcotics, he was still complaining of intense pain in his back.

Q. At 5:45, 1 cc. Dromaron. Was that for the same reason? A. That is right.

Q. At 9:00 o'clock we find 400,000 units of penicillin. A. Yes, sir.

Q. And at the same time 4 cc. of Deprapanex.

A. Yes. That was when we were expecting the ileus to develop.

Q. The paralysis of the bowel that you spoke of?

A. Yes.

Q. Later that night I see the medicine administered was [99] Sedamyl? A. Yes.

Q. What is the purpose of that?

A. The patient still had not apparently had his pain completely controlled and Sedamyl had to be given as a general sedative, a mild sedative, to try to help relax the emotional aspect.

Q. I notice an entry here at 10:20, Dromaron 1 cc. "for pain in back." Is that correct?

A. Yes.

Q. At 10:30 he was catheterized? A. Yes.

Q. And Dromaron again at 3:40 in the morning?

A. Yes.

(Testimony of Dr. Constantine Otto Schneider.)

Q. On the morning of the 11th Deprapanex, 4 cc. again. That was for the ileus?

A. For the ileus, yes.

Q. And again penicillin? A. Yes, sir.

Q. Did you not order and was there not given glucose intravenously to supply loss of moisture in the system?

A. I believe he was given that while he was there. I will have to check the records. Yes, he was given 10 per cent glucose in water, distilled water.

Q. That was at 10:30 at night, the night of the 11th, is [100] that correct? A. Yes, sir.

Q. All of these medicines and treatment had been followed by your initial orders?

A. I believe the bulk of it had been. There were some changes made by Dr. Stalder who changed my initial order from morphine sulphate to Dromaron and then later he increased that dosage himself.

Q. Is it the usual practice for doctors to make the rounds of the hospital in the morning?

A. Generally, yes.

Q. Then, for the balance of the day, is it ordinarily not a fact that they expect the resident physician to keep somewhat in touch with the patient and to know how he is progressing?

A. That is right, sir.

Q. And, unless he receives a telephone call, does he not have the right to assume that there has at least been no change for the worse? A. Yes.

Q. Doctors Craig and Leonard, who saw him on the morning of the 11th, apparently relied on you

(Testimony of Dr. Constantine Otto Schneider.)
and Dr. Stalder to keep them informed in case of a change? A. Yes.

Q. I notice on the morning of the 12th he ate a light diet, [101] had a light diet, consisting of one-half serving of cereal, coffee and a soft egg, is that correct? A. On the morning of the 12th.

Q. Yes, before leaving for Seattle?

A. Yes, sir.

Q. Then I notice Dromaron, 1 cc., again, administered at 9:30? A. Yes, 9:30—no, 7:50.

Q. 7:50, I believe it is. A. Yes.

Q. Then at 8:00 o'clock it shows, "Transferred by ambulance to Seattle." A. Yes.

Q. Were you on duty at the time he left for Seattle? A. No.

Q. Was Dr. Stalder on duty? A. Yes, sir.

(Recess.)

Mr. Thomas H. Ryan: If the Court please, we have Dr. Cherry here, but we would just as soon not have him come until tomorrow afternoon at 2:00 o'clock. I do not think we will reach him until that time, although we might have to adjourn a little early tomorrow at noon if that is all right with the Court. [102]

The Court: How long are you going to take to try this case, all summer?

Mr. Thomas H. Ryan: No; I think we will be finished tomorrow.

(Testimony of Dr. Constantine Otto Schneider.)

Cross-Examination

(Continued)

By Mr. Harr:

Q. Dr. Schneider, on direct examination I believe you made this statement, that you saw the ends of the bone in the wound but they did not show through? A. Yes.

Q. Counsel asked you whether or not you had reduced the fracture, and I think your comment was you saw no need to reduce the fracture. Will you state what you had in mind when you made that statement? Do you recall giving that answer?

A. I believe I said that.

Q. Would you explain why you made that comment?

A. Well, at that time the patient was in what we will describe as a somewhat rocky condition, and I could see no reason at that time for my attempting any manipulation which might cause further tendency to push him into shock, if shock were impending, or anything of that sort. His condition was not stable, in my professional opinion at that time. [103]

Q. Did you not have in mind that you at that time were acting in an emergency capacity?

A. Yes.

Q. If there had to have been surgery and a reduction of the fracture, then that would fall to the duty of those to whom the case was assigned?

A. Yes.

Q. In other words, Dr. Craig and Dr. Leonard?

(Testimony of Dr. Constantine Otto Schneider.)

A. Yes.

Q. If you had this whole thing to do over again, would you have varied your treatment in any degree?

A. My initial care?

Q. Yes.

A. No, sir.

Q. Would you have changed it in any respect?

A. My initial care, I would not.

Mr. Harr: That is all.

Redirect Examination

By Mr. John D. Ryan:

Q. You said, if you were asked to do this same thing again, that your initial care would not have varied?

A. In my initial care, until the patient was put to bed and I had notified the physician in charge of the case, I think I would have made no [104] change.

Q. You are bringing that to the time you telephoned to Dr. Craig?

A. Yes.

Q. Would you have sent the patient to Seattle under the same circumstances, if you had to do it over again?

A. I am not here as an expert witness.

Mr. Harr: If your Honor please, I think that is objectionable.

The Court: Objection sustained.

Q. (By Mr. John D. Ryan): Doctor, you said you were concerned with the condition of the fracture of the second lumbar vertebra, that it had given you serious concern?

A. That is right.

(Testimony of Dr. Constantine Otto Schneider.)

Q. In terms of treatment, what was your intention? Did that involve putting the man in bed?

A. Oh, yes. You mean my initial care?

Q. Yes.

A. In bed and in hyperextension; that is, with his back arched.

Q. Was it your intention to immobilize the man in that respect? A. You mean immediately?

Q. Yes.

A. In most cases it is not necessary to immobilize immediately. Hyperextension is common treatment of these fractures [105] in itself.

Q. You did put him in hyperextension?

A. I did put him in hyperextension.

Q. You deemed that to be sufficient and the best thing for him at that time?

A. Adequate at that time.

Q. With respect to his condition, you said he was in incipient shock?

A. That is the term I used.

Q. In the course of his treatment he never went into actual or complete shock?

A. Not into complete shock.

Q. You were not certain as to the inception of the ileus, but you do know you catheterized at 10:30 on the night of the 10th? A. Yes.

Q. But you were fearful of it coming on some time? A. Yes.

Q. Was there any other factor that weighed upon your mind with regard to any further treat-

(Testimony of Dr. Constantine Otto Schneider.)
ment, postponing any further treatment other than the ileus and incipient shock?

A. I believe those two factors, plus the fact that the man had a compression fracture of the spine. My personal opinion was—I would imagine at the time—that until we had the pain from the back, which was the outstanding single factor, [106] under control, that the man could have gone into shock at that time.

Q. Did you ever get it under control?

A. The pain?

Q. Yes.

A. It started to come under control, I believe—may I refer to the record?

Q. Yes.

A. It apparently started to come under control approximately in the afternoon of the 11th, in regard to pain.

Q. On the 10th, at 3:00 p.m., did you take the blood pressure that is recorded?

A. At 3:00 p.m.? There is one recorded here at 4:45 on the afternoon of the 11th.

Q. What is that?

A. Blood pressure. Is that the one you mean? 130 over 90?

Q. I am asking about June 10th.

A. The blood pressure at 3:00 o'clock was 140 over 88.

Q. Is that a good blood pressure?

A. It is not, in case of an injury.

(Testimony of Dr. Constantine Otto Schneider.)

Q. When you speak of postponing further definitive treatment, would you admit the operation that was performed which you have read a description of, performed on June 12th, 3:03 p.m., in Seattle, would you admit that to be definitive treatment? A. How do you mean, sir? [107]

Q. You stated you felt no further treatment should have been undertaken to the leg at this time because of the considerations you have stated?

A. At the time I had some responsibility for the case, and that was only a period of approximately an hour or an hour and fifteen minutes—during that time I felt until I had notified the staff physician, I felt nothing could be done during my time of responsibility.

Q. Considering those factors, would you say that the treatment described in the operation—you read a description of the operation into the testimony here, the operation performed up in Seattle. Would you say that would have been proper and definitive treatment?

A. I would have to look at that again.

Q. I believe it is on Page 11 of Exhibit No. 3.

A. That again concerns strictly orthopedic procedures done by an orthopedic surgeon. I don't think I am qualified to answer that.

Q. Let me ask you the question this way: You said you did not feel anything further should be done. You have expressed an opinion as to that in your testimony. Then you said nothing further

(Testimony of Dr. Constantine Otto Schneider.)

should be given to the patient because of the considerations which you have enumerated; one, the possibility of shock and, the other, the ileus proposition; and you also said he did not go into incipient shock and he never did go [108] into shock, and you didn't know when the onset of the ileus was other than you had him catheterized at 10:30 the night he was brought into the hospital. What did you have in mind as to what should be done further?

A. You are asking me for my opinion of definitive treatment?

Q. I am asking you what you meant by your remark that you did not think anything further should be done to the patient. The fact is that you were at least in attendance upon the patient and that you did all that could be done under the circumstances, you claim. I am asking you whether if these circumstances had been controlled, would you deem this treatment here to be the next which would have been done in this case?

A. This one here?

Q. Yes.

A. I believe that would have been satisfactory.

Q. At the Ancker Hospital, after giving emergency treatment, you said they went to the surgery floor. Would that be the customary thing to do with a compound fracture?

A. This would have been adequate procedure, yes.

(Testimony of Dr. Constantine Otto Schneider.)

Q. At Ancker Hospital what would be the time interval between emergency treatment, X-rays and then to the surgery floor?

A. They would go to surgery, but that doesn't mean—they would go to the surgery floor. The floors are divided according [109] to service. They might go to the surgery floor and it might be a day or two or it might be a couple of weeks before a case of this kind was operated. I can't say. That is specialized procedure. It would not be my responsibility to make a decision of that kind.

Q. Who would make that decision, in the way of specialists? A. Anyone called in consultation.

Q. Anyone called in consultation? What kind of a doctor would be called in consultation?

A. In this particular case a general surgeon was called in consultation at the Marine Hospital, apparently an orthopedic surgeon.

Mr. John D. Ryan: I have no further questions.

Recross-Examination

By Mr. Harr:

Q. You said you talked to Dr. Craig and you talked to Dr. Leonard. Did you inform them completely as to what you had done for Mr. Morin?

A. I believe when I talked to—if I remember correctly, when I talked to Dr. Craig, I think I might even have mentioned the man was having severe pain and apparently had a fracture of the back.

(Testimony of Dr. Constantine Otto Schneider.)

Q. In other words, the fact is that they had accepted the original treatment you had given? [110]

A. Yes.

Q. And you assumed from that that they knew exactly what you had done. Do you know that you did notify them? A. I believe I did.

Mr. Harr: That is all.

Redirect Examination

By Mr. John D. Ryan:

Q. Do you know that you informed them of what you did?

A. When I talked to Dr. Craig, I explained the procedure we had carried out and suggested the necessity of X-rays, to the best of my recollection.

Q. To the best of your recollection did you tell him what you did in emergency surgery?

A. You mean the specific procedures?

Q. Yes.

A. I may not have described them completely.

Q. Did Dr. Craig ask you what you had done to the patient in emergency surgery?

A. I can't remember exactly. I really couldn't answer that. I couldn't remember if he asked me specifically or whether he did or not.

Q. Did Dr. Leonard ever ask you?

A. I can't answer that, either. I believe my major discussion was with Dr. Craig. [111]

Q. You know Dr. Albert Morrison of the U. S. Public Health Service? A. Yes.

(Testimony of Dr. Constantine Otto Schneider.)

Q. Did he ever ask you about it? A. Yes.

Q. When I am asking you these questions, I am referring to the period during which the patient was under treatment and particularly June 10, 1952.

A. Just the period in the emergency room.

Q. I am referring to the period during which he was in the hospital, at Physicians and Surgeons Hospital, on June 10, 1952.

A. The entire period?

Q. I am saying June 10, 1952, first.

A. Just June 10th?

Q. Yes.

A. I don't think I was ever in contact directly with Dr. Morrison.

Q. Would the same answer apply with regard to your recollection as to whether they specifically asked what had been done for the patient, would it apply to June 11th or the morning of the 12th?

A. I believe so. I don't remember ever having been in contact with any of these physicians on either the 11th or 12th.

Q. Would that apply to all the gentlemen I have named? [112] A. Yes.

Q. Did you say you talked with Dr. Leonard?

A. I beg your pardon. You mean on the initial day?

Q. Yes.

A. I believe I did. I can't remember specifically, but I think I called him; but I can't remember whether Dr. Craig said he was going to call him

(Testimony of Dr. Constantine Otto Schneider.)
or whether I was to call him. I can't remember that.

Mr. John D. Ryan: No further questions.

Recross-Examination

By Mr. Harr:

Q. The only purpose you had in calling Dr. Craig was to tell him about the patient and to tell him what his trouble was? A. Yes.

Q. I think you said after the X-rays were taken you talked to him again?

A. I believe that is correct.

Q. And the object of your calling him was to inform him of what you had done and what you found out? A. That is correct.

Mr. Harr: That is all.

(Witness excused.) [113]

DR. LEE A. CRAIG, JR.

produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. You are Dr. Lee A. Craig? A. Yes.

Q. You are an M.D.? A. Yes.

Q. Would you tell us your qualifications in terms of education up until June 10, 1952?

A. I took my premedical training at Westminster College at Fulton, Missouri, and also at Leland Stanford University in California. I then took my

(Testimony of Dr. Lee A. Craig, Jr.)

medical training in the St. Louis University Medical School in St. Louis, Missouri.

From there I took my internship at the U. S. Marine Hospital in Seattle, Washington, and from there, in the summer of 1949, I was transferred to the U. S. Public Health Service out-patient clinic at Portland, Oregon, where I performed general clinic and hospital duties essentially of the same type as I was performing at the time Mr. Morin was injured.

Q. The general clinic and hospital duties, what would those consist of, Doctor?

A. Well, we had an out-patient clinic at the U. S. Court House, in this building, where we took care of all types of [114] medical and surgical problems and patients requiring hospitalization were hospitalized at the Physicians and Surgeons Hospital. They were sent there by us and by our designated consultants.

Q. Did you actively, yourself, treat patients at the Physicians and Surgeons Hospital?

A. Yes.

Q. You mentioned consultants designated by the U. S. Public Health Service. Was it your duty or your job to call in consultants at the time you deemed one was needed?

A. I would say yes, subject to the approval and consent of Dr. Morrison.

Q. Who is Dr. Morrison?

A. Dr. Morrison is the medical officer in charge

(Testimony of Dr. Lee A. Craig, Jr.)

of the U. S. Public Health Service out-patient clinic in Portland.

Q. Do you recall treating Amos Morin at the Physicians and Surgeons Hospital in Portland, Oregon? A. Yes, I do.

Q. Was Mr. Morin entered in the hospital under that name on June 10, 1952? A. I believe so.

Q. Do you recall personally this particular case, of your own recollection? A. Yes.

Q. Have you also had reason to refresh your memory by consulting [115] the records involving this case? A. Yes.

Q. Have you had reason to consult with the other doctors concerned with this case?

A. Some of the doctors.

Q. What doctors have you talked to about this case?

A. I talked to Dr. Morrison and briefly to Dr. Leonard and also to Dr. Schneider, and I think that is all.

Q. Dr. Leonard—what is his full name, please?

A. Dr. John B. Leonard, I believe.

Q. What was his relationship to the United States Public Health Service in June, on June 10, 1952, and during the time Mr. Morin was treated at Portland?

A. At that time he was a part-time consultant for the U.S.P.H., at the Physicians and Surgeons Hospital.

Q. By "part-time consultant," what would his duties be?

(Testimony of Dr. Lee A. Craig, Jr.)

A. Well, in his capacity as general surgeon he would give consultative service and do surgery upon such cases as we thought required his attention.

Q. At this time you say he was a general surgeon? A. Yes.

Q. At this time was there an orthopedic surgeon acting as consultant to the U. S. Public Health Service? A. Yes, I believe there was.

Q. Who was he? [116]

A. The only one I recall or remember specifically is Dr. Kimberley.

Q. What is his full name?

A. A. Gurney Kimberley, I believe.

Q. A. Gurney Kimberley? A. Yes.

Q. Is he at present practicing in Portland, Oregon, to your knowledge? A. Yes.

Q. You say he is an orthopedic consultant?

A. Yes.

Q. To your knowledge, that is his specialty?

A. Yes.

Q. He was a consultant with the U. S. Public Health Service? A. Yes, he was.

Q. And that was his duty at the time Mr. Morin was in the hospital?

A. I believe that is correct, yes.

Q. Were there any other consultants, as we call them, in the U. S. Public Health Service at that time that you can recall?

A. We had a number of doctors in various specialties that were called in suitable cases. We were free, actually, to use almost any bona fide specialist.

(Testimony of Dr. Lee A. Craig, Jr.)

Q. I see.

A. In other words, we were not bound by a list or required [117] to use any one doctor in any one specialty, necessarily.

Q. Am I to understand, then, you would be free, if you felt the case required it, to call upon any orthopedic specialist as the need might arise, if you thought an orthopedic specialist were necessary for the treatment of a patient?

A. That is correct.

Q. And, similarly, if there were some other problem involved, you would be free to call upon some other specialist on the same basis?

A. Yes.

Q. Have you familiarized yourself with these charts of the Physicians and Surgeons Hospital concerning Mr. Morin's treatment?

A. I have looked at it several times, but I don't know it verbatim. I will take it, if you are going to refer to it.

Mr. John D. Ryan: Will you hand that to Dr. Craig?

Q. When were you first informed, Doctor, of Mr. Morin's presence at the hospital, the Physicians and Surgeons Hospital in Portland, Oregon?

A. I would say it was shortly after he was admitted to the hospital. I would say, just as a guess, within an hour.

Q. Are you capable of saying what the time of admission was?

A. No; I don't remember it. [118]

(Testimony of Dr. Lee A. Craig, Jr.)

Q. Who notified you or informed you of it?

A. I do not have a clear recollection. I know it was either the girl in the emergency surgery or Dr. Schneider himself.

Q. Are you able to say what was said to you when you were informed?

A. I know I was told he had a fractured left leg. I am not clear as to whether or not at that time I was informed—I am speaking of the very first call, my notification that he was there. I am not sure that I was told he had a fracture of his lumbar spine, and I think it is possible, perhaps, that I was not, inasmuch as the X-rays had not yet been taken.

Q. You say a fracture of the left leg?

A. Yes, informed——

Q. Were you informed that it was a compound fracture?

A. I believe so, but I do not have an independent recollection of it.

Q. Where were you when you were informed?

A. I believe I was at the clinic, because at that time of day I would be down there seeing patients.

Q. By the “clinic,” you mean the U. S. Public Health Service Clinic?

A. Yes.

Q. That is here in the United States Court House?

A. Yes. [119]

Q. Can you tell us what directions you gave to Dr. Schneider?

A. He, of course, told me what he thought was wrong with the patient and, up to that point, what he had done. I think we agreed that the patient

(Testimony of Dr. Lee A. Craig, Jr.)

should have X-rays, and then, of course, I was to be notified when the reports were in or when the X-rays had been seen by Dr. Schneider.

Q. You say he informed you what had been done. What did he tell you had been done to the patient at the time he called?

A. He simply said the leg had been uncovered and was being dressed and cleaned.

Q. Was being dressed and cleaned?

A. Yes, sir.

Q. You don't know whether at the time he called you it had already been dressed and cleaned?

A. I don't know whether, for instance, he stepped in and took the pant leg off and looked at it or stepped out and called me or whether he had already done that and called me. I don't recall.

Q. Your memory is hazy on that point?

A. Yes.

Q. Could you tell me why Dr. Schneider called you?

A. Well, it was customary to have one of the medical officers responsible for admissions and the care of patients at the hospital at all times, both day and night, and if a [120] patient was taken to the hospital in the daytime, such as this, they would call us and tell us what was wrong with the patient and we would then advise them as to what should be done.

Q. Would that be in your capacity as an officer in the U. S. Public Health Service? A. Yes.

Q. I note that the patient was entered under

(Testimony of Dr. Lee A. Craig, Jr.)

your name. Were you the attending physician to this patient, then?

A. Well, actually, this patient was a U. S. Public Health Service patient and, as such, it was the responsibility of the group, you might say, at this clinic.

However, since I was on call or I was on duty at that time, my name was simply entered as the admitting doctor.

Q. At the time you got this telephone call, you say he indicated X-rays should be taken. Were those your orders to Dr. Schneider?

A. Well, I don't recall that I directed him specifically. I mean, that is the logical step, or he may have said, "I think we are going to send him down to X-ray," and I could have said, "All right, that is fine. Go ahead and do it."

Q. Was there any discussion at that time regarding surgical procedure?

A. Not in that initial call, certainly not.

Q. Excuse me? [121]

A. No. The point was to find out what was wrong with the patient and decide what was to be done.

Q. At any time during the patient's stay in the hospital—June 10th, June 11th or June 12th—was there any discussion about surgical procedure, other than emergency care?

A. Yes, I think it was discussed.

Q. With whom was it discussed?

(Testimony of Dr. Lee A. Craig, Jr.)

A. I am sure I discussed it with Dr. Morrison, also with Dr. Leonard.

Q. What possible surgical procedures were considered?

A. Well, the only thing that we did—the only thing that needed to be done, in addition to what was done, would be final reduction of the fracture site and application of a plaster cast to the leg.

Q. Would that final step involve closure of the site? A. It might.

Q. Was that what was discussed? A. Yes.

Q. That was discussed with whom, please?

A. Dr. Leonard and Dr. Morrison.

Q. When did that discussion take place?

A. When the patient came in on the 10th—is that the first day?

Q. June 10th is the first day. The record shows he came in about 1:15 p.m. [122]

A. As soon as I found out what was wrong with the patient I, of course, conferred with Dr. Morrison. Then we agreed Dr. Leonard would be asked to consult with us and help us in our care of the patient.

I also talked again to Dr. Morrison the following morning after I had seen the patient and on the afternoon, then, of the same day, the 11th, there was further discussion as to whether they were going to keep Mr. Morin here in Portland or send him to Seattle.

Q. Did you talk to Dr. Leonard on June 10th, the day Mr. Morin was taken to the hospital?

(Testimony of Dr. Lee A. Craig, Jr.)

A. I don't recall whether I talked to him or not. I know he was notified, but whether I did or Dr. Stalder or Dr. Schneider—I know the matter was discussed as to his present condition.

Q. Did you, as general physician or as physician in whose name this man was entered in the hospital, know what Dr. Leonard advised regarding treatment on June 10th?

A. I think we certainly agreed that he should be watched closely and, as soon as emergency care was given, he should be put to bed.

Q. Did you discuss with these gentlemen the question of whether he should be kept in Portland or sent to Seattle?

A. That day?

Q. Yes. [123]

A. No.

Q. Did you discuss that on June 11th?

A. Yes, I think so.

Q. With respect to the patient's condition of health, why was it determined that he should be sent to Seattle?

A. I don't think it was purely his health that was a consideration for sending him to Seattle. Once we had agreed that it did not change the prognosis with regard to the healing of either his leg or back, and since his condition was felt to be satisfactory, then we agreed that he could be sent to Seattle, which was the regular procedure at this clinic in Portland.

Q. If the patient's condition warranted it, would the U. S. Public Health Service keep a patient in Portland and treat him at the Physicians and Sur-

(Testimony of Dr. Lee A. Craig, Jr.)

geons Hospital? A. Yes.

Q. Was the Physicians and Surgeons Hospital equipped and capable of caring for a patient in this condition, to your knowledge? A. Yes.

Q. Was it a Class A or a Grade A hospital in this community in Portland, Oregon? A. Yes.

Q. Was the question of expense considered in any of these discussions as to whether the man should be kept here or sent [124] to Seattle?

A. Well, that, of course, would be a consideration. If there were nothing else to influence the opinion, certainly the matter of expense would be a consideration, simply because there is the Government Hospital in Seattle to which they may send patients, whereas this private hospital is employed on a contract or fee basis, and if there is a bed in Seattle that might be occupied, it certainly is cheaper for the Government, for the taxpayers, to send him there.

Q. When did you first see the patient?

A. I saw him in the morning, the next morning after he was admitted. In other words, if he were admitted on the 10th, I saw him the morning of the 11th.

Q. On the 10th did you personally attempt to contact any consultant or specialist or any other doctor to have him go on the 10th and see the patient and treat the patient on the 10th?

A. None other than Dr. Leonard.

Q. To your knowledge, did Dr. Leonard go to see the patient on the 10th?

(Testimony of Dr. Lee A. Craig, Jr.)

A. No, I don't think so.

Q. Did you at any time on the 10th of June, 1952, consult an orthopedic man about this case?

A. No.

Q. Did you request that an orthopedic man be consulted, [125] through your office? A. No.

Q. You say you first saw the patient on the 11th? A. Yes.

Q. About what time was that, Doctor?

A. It was—it is my recollection it was about 9:00 o'clock in the morning.

Q. Your recollection is fortified, I take it, by the nurse's chart? A. Yes.

Q. Were you in the company of anyone?

A. I was with Dr. Stalder.

Q. Who is Dr. Stalder?

A. He was another resident serving at the Physicians and Surgeons Hospital.

Q. At that time were you informed of the condition of the patient?

A. Dr. Stalder told me how the patient had been doing, and we looked at him.

Q. What did he tell you?

A. He simply said he had been in a lot of pain, and he described the case from there on, the procedure Dr. Schneider had carried out when he was admitted, and we agreed then we would follow Dr. Leonard's recommendations in this case.

Q. What were Dr. Leonard's recommendations in the case? [126]

A. Well, he felt the patient's condition was poor

(Testimony of Dr. Lee A. Craig, Jr.)

and that certainly we could not attempt to manipulate this leg any further until it improved sufficiently.

Q. Did Dr. Leonard tell you that directly?

A. I think he did, yes.

Q. Did Dr. Leonard, either on June 10th or June 11th, discuss the question of a simple closure of the wound?

A. No, I don't think that was a matter for discussion.

Q. When you saw the patient, I believe in your deposition you said he was in a ward, Ward C, at the Physicians and Surgeons Hospital?

A. Yes.

Q. Will you tell us what you observed with regard to the patient, where he was, and what the condition of his leg was, and of his back?

A. Well, he was simply lying in bed on his back, flat in bed, with his head down, and his left leg was raised up on pillows, and he was encased in a large bulky dressing of cotton from up above the knee down to the foot.

I would say he was under the influence of a sedative or one of the pain-killing drugs, to the extent that I did not feel much could be served by talking to him, because he was not what I would say alert.

Q. The wound was bandaged?

A. Yes. [127]

Q. Did you look at that time at the wound or not?

A. No.

Q. Did you ever look at the wound?

(Testimony of Dr. Lee A. Craig, Jr.)

A. No.

Q. Would you tell me whether there was any blood coming through the bandage?

A. I don't remember seeing any.

Q. Can you look at the record there that you have before you and see if it helps you in any way to refresh your memory?

A. June 10th, at 9:00 o'clock p.m., there is a nurse's note, "Some bleeding from left leg," which I assume was oozing through the dressing; and again on the 11th the bedside notes show "Some bleeding through dressing," so I assume that there was some oozing.

Q. Can you give us some idea of the size of the dressing surrounding the wound?

A. As I said, extended from above the knee down to the foot and it was quite bulky.

Q. Would it take an appreciable amount of blood to come through a dressing of that size?

A. Well, maybe half a teacup, if you have to estimate the amount. In any wound like this you get a great deal of serum that oozes out, which must be distinguished from fresh blood. You can have a larger volume of serum colored by a smaller [128] amount of red blood.

Q. Is there any significance to that oozing of serum?

A. That is usual in this type of injury.

Q. It is usual in this type of injury?

A. Yes.

Q. You are assuming from the information it was a compound fracture of the left tibia?

(Testimony of Dr. Lee A. Craig, Jr.)

A. Yes.

Q. Did you at this time look at the X-rays?

A. On the 11th?

Q. Yes.

A. I don't recall that I have an independent recollection, but normally I would.

Q. The X-rays were taken on the 10th, as you know, from looking at the record. Does that refresh your recollection at all, or do you just have to go on the basis that you normally would have looked at them?

A. Well, I would have to go on that basis.

Q. Did you take the patient's blood pressure?

A. I did not take it myself personally, no.

Q. Have you any idea what the blood pressure was at that time?

A. Are you speaking generally, during his stay in the hospital?

Q. Excuse me? [129]

A. Just generally throughout his stay in the hospital?

Q. Well, was it fairly constant during his stay at the hospital?

A. From what I have heard—hearsay—it was, yes, but let me look here. The two pressures I see are, one at 135 and one at 140. That is reasonably constant.

Q. If you were concerned about shock in the patient, would you take his blood pressure?

A. Yes, I think so. I would say this: We would check it at—to check it at too frequent intervals

(Testimony of Dr. Lee A. Craig, Jr.)

might be a needless waste of time; on the other hand, if the patient looked pale, it might be well to check it more often.

Q. Was this patient in a state of shock?

A. I would say he was in moderate shock, from what I was told.

Q. Would the fact that he was under sedation make difficult a diagnosis as to what his condition with relation to shock was? A. No.

Q. From your observation of the patient, not from what you were told, would you say the patient was in shock? A. No.

Q. You did not take his blood pressure at that time or at any time during the course of treatment there? Is that correct? [130]

A. No. Yes, that is correct.

Q. Anything else you observed about the patient when you saw him on the morning of the 11th?

A. No. I think I have described his condition pretty well. He was just simply lying in bed, and he was uncomfortable, as you might expect.

Q. Did you see the patient again, Doctor?

A. No, I don't recall that I did; no.

Q. Will you describe how the patient's leg was elevated in the bed?

A. Elevated on pillows, with the knee bent slightly, I would say.

Q. There was no external splint on the leg you could see?

A. I would say the dressing that was on the leg constituted a splint.

(Testimony of Dr. Lee A. Craig, Jr.)

Q. It constituted a splint? Did you see a common splint on the leg? A. No.

Q. Did you have a further consultation with Dr. Leonard regarding the patient on the 11th?

A. You mean separate from the consultation on the 10th?

Q. Yes. A. Yes, I believe I did.

Q. You had a conversation with him on the 10th?

A. Well, as I already told you, I am not sure whether I [131] talked to him or whether Dr. Schneider talked to him.

Q. Then, on the 11th, did you have a further conference? A. Yes.

Q. What was the nature of the conference that took place?

A. We discussed his general condition.

Q. What did the two of you talk about?

A. If he were stable enough to transport, would it be all right, you might say, to send him to Seattle. That, in essence, would be what we talked about. In other words, in the meantime, it had come up that he could be transported and we had decided his condition was perhaps suitable, and we would like Dr. Leonard's approval of that before we did the paper work involved.

Q. Did Dr. Leonard say he had looked at the wound? A. I don't recall that he did, no.

Q. Do you know if Dr. Leonard looked at the wound? A. Well, I doubt if he did.

Q. You say he was suitable to be transported. This was on the 11th. Was it during the morning

(Testimony of Dr. Lee A. Craig, Jr.)

of the 11th, about 11:00 o'clock, when Dr. Leonard was at the hospital, or would it have been later in the day that you conferred with him?

A. It would have been probably that afternoon.

Q. When you contemplated sending the man to Seattle, did you discuss what he needed treatment for? [132]

A. Well, in general, I think we all agreed the fracture should be reduced. This is my own thought. I don't recall the exact conversation, but the fracture should be reduced as completely as possible and a suitable splint applied and a plaster cast or traction if that becomes necessary. Many times you can't determine whether traction or a cast is necessary until you have actually tried to completely reduce the fracture.

Q. Did Dr. Leonard tell you what had been done to the wound by Dr. Schneider?

A. No, I don't think so.

Q. Did you tell Dr. Leonard what had been done to the wound by Dr. Schneider?

A. No, because I think he certainly would have already discussed this with Dr. Schneider or Dr. Stalder.

Q. Was there any discussion of the factor of time with regard to further treatment of the leg?

A. In order to arrive at a decision as to whether you were going to send him, you had to agree that the time that it took to transfer him would be time that would not be harmful to him, so I think we did consider the time factor.

(Testimony of Dr. Lee A. Craig, Jr.)

Q. Was there any discussion that the critical time had already passed by the time you and Leonard had your conversation as to the treatment of this leg?

A. You say "critical time." What do you mean by that? [133]

Q. I am assuming that the man was brought in at 1:15 on the afternoon of the 10th and you had this conversation with Dr. Leonard sometime after 11:00 o'clock on the 11th. A. Yes.

Q. Was there any discussion that there had been any lost opportunity in regard to treatment?

A. No. As a matter of fact, I think we were all glad that time had elapsed simply because it allowed the patient to go through this period of instability rather than a period in which shock would be likely to ensue.

Q. If there had been a debridement, a closing of the wound, would it have to be done in general surgery as distinguished from the emergency room?

A. I think the nature of the wound would determine whether the man required general surgery or not. If it were a large procedure involved, trimming of dead or devitalized tissue, it might require major surgery, or the need of surgery, but I think, from what I know about this particular wound, it didn't require that type of debridement.

The Court: Adjourn until 10:00 o'clock tomorrow.

(Thereupon an adjournment was taken until 10:00 o'clock a.m. Thursday, July 22, [134] 1954.)

Thursday, July 22, 1954

(Court reconvened at 10:00 o'clock a.m., pursuant to adjournment, and further proceedings herein were resumed as follows:)

Mr. John D. Ryan: If the Court please, there may be some problem in obtaining the last witness to be called by the plaintiff this morning, Dr. Cherry, and counsel for the defendant have asked if one of their witnesses might be put on out of order at this time.

The Court: I don't care about the order.

Mr. Luckey: We are not interested in putting on any testimony out of order. If the plaintiff can complete his case, I don't want to put on any evidence which would prejudice our rights to make a proper motion at the end of the plaintiff's case in chief.

The Court: I understand.

Mr. Luckey: If Counsel wants to stipulate it will be without prejudice——

The Court: He does not need to stipulate. I will make that decision.

Mr. John D. Ryan: It is certainly agreeable with us.

Mr. Harr: This witness will be a very short one. He is the ambulance driver who took the plaintiff to the hospital.

The Court: Put on your evidence in any order you want to. It does not make any difference to me. [135]

ROY COX

produced as a witness on behalf of the Defendant, United States of America, out of order, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Will you please state your full name?

A. Roy Cox.

Q. George? A. Roy.

Q. What is your occupation?

A. Ambulance driver.

Q. You work for the Buck Ambulance Company now? A. Yes.

Q. On June 10, 1952, what was your occupation?

A. I was an ambulance driver.

Q. That was for the Arrow Ambulance Company at that time? A. Yes.

Q. On June 12, 1952, did you go to the Physicians and Surgeons Hospital in Portland, Oregon, and pick up two patients to take to Seattle?

A. Yes, sir; I did.

Q. Was one of those patients Amos Morin?

A. Yes.

Q. You then transported these two patients to Seattle? A. Yes. [136]

Q. To what hospital in Seattle?

A. U. S. Marine Hospital.

Q. That is the U. S. Public Health Service Hospital in Seattle? A. Yes.

Q. Do you know what time you went to the

(Testimony of Roy Cox.)

hospital, the Physicians and Surgeons Hospital, in Portland, to get these patients?

A. Well, it was just about 8:00 o'clock when I arrived there.

Q. Then did you take the patients aboard promptly?

A. Yes, we loaded the two patients and left for Seattle immediately.

Q. What, if anything, was given to you to deliver to the hospital authorities in Seattle?

A. There was an envelope for each patient given to us at the P & S, and we delivered them to the admission office at the Seattle hospital.

Q. That was from the U. S. Public Health Service at Portland addressed to the U. S. Public Health Service at Seattle? A. Yes.

Q. Did you have sealed envelopes, or were they sealed envelopes, do you remember?

A. To the best of my knowledge, they were sealed, yes.

Q. Did you deliver those envelopes in Seattle when you [137] arrived there at the hospital?

A. Yes.

Q. In transporting these two patients to Seattle, on your route up there, you by-passed Tacoma and Olympia, did you not? You turned off at Tenino?

A. Well, I don't remember if we turned off at Tenino.

Q. Do you know about what time you arrived in Seattle?

A. It was probably a little after 12:00. I don't know exactly.

(Testimony of Roy Cox.)

Q. What was the nature of the vehicle you were driving? A. It was a '52 Cadillac.

Q. Do you know how the berths were arranged in there? What was the arrangement?

A. A cot along each side of the ambulance and there are two arms that go up on each side.

Q. Sort of rails that fit close to the individual?

A. Yes, right close, about like that (illustrating).

Q. In other words, were those rails to prevent a person from moving about?

A. So you couldn't roll off the cot.

Q. Do you recall whether or not there was anything put under the back of Mr. Morin at the time he left the Physicians and Surgeons Hospital?

A. Well, I think—I know we had him laying real flat. I think they wanted us to have a little pillow or something right [138] under his back, if I remember.

The Court: I need to have something cleared up. Is complaint being made about the back?

Mr. John D. Ryan: No, your Honor, just the leg.

Mr. Harr: Except the back was one of the conditions that we had to contend with; that is all.

The Court: Proceed.

Q. (By Mr. Harr): Do you know whether or not there were any sedatives taken along, or empirin?

A. I think there was some empirin taken along, in back of the ambulance. I don't know whether the attendant gave him that empirin or not.

(Testimony of Roy Cox.)

Q. There was an attendant in the back at all times? A. Yes.

Q. From the time you left Portland until you arrived in Seattle? A. Yes.

Q. Do you know anything about Mr. Morin's condition during that trip?

A. Well, several times along the road I asked the attendant how the patients were riding, and no one complained to me.

Q. Do you know whether or not Mr. Morin slept throughout the greater part of the trip?

A. I think he slept quite a bit. I don't know how much.

Mr. Harr: That is all. [139]

Cross-Examination

By Mr. John D. Ryan:

Q. Do you recall this case of your own personal knowledge, or has your knowledge been refreshed?

A. Yes, I recall it, because we didn't have to make too many trips up there.

Q. You rode in the front seat of the ambulance at all times? A. Yes.

Q. Had you reason to observe the leg of Mr. Morin?

A. I don't recall too much about his leg. I know he had some injuries, you know.

Q. Were you given any particular instructions?

A. Well, just to keep him flat. We had orders

(Testimony of Roy Cox.)

to take these—you know, to deliver the papers. I presume there were orders as to him.

Q. Who gave you your instructions?

A. The nurse—I don't know which nurse it was—at the Physicians and Surgeons, but the nurse on the floor. I think, if I remember right, she had me go to the admitting office and pick them up. They leave the envelopes there at the office. That is where we generally pick them up, you know.

Mr. John D. Ryan: I have no further questions.

Mr. Harr: I think that is all.

(Witness excused.) [140]

DR. LEE A. CRAIG, JR.

a witness produced in behalf of the plaintiff, having been previously duly sworn, resumed the stand and further testified as follows:

Direct Examination

(Continued)

By Mr. John D. Ryan:

Mr. John D. Ryan: I believe Dr. Craig was being handed Plaintiff's Exhibit No. 3 at the close of the session yesterday.

Q. Would you look at the summary in Plaintiff's Exhibit No. 3, which is the clinical record of treatment of the U. S. Marine Hospital of the plaintiff. Are you familiar with the description of the wound as it is given in that summary, Doctor?

A. Not exactly.

(Testimony of Lee A. Craig, Jr.)

Q. Would you just read the description of the wound as it is given there? Read it out loud?

A. "On admission, the patient immediately underwent scrubbing of the leg and irrigation of the wound."

Q. The description, I believe, is above that, isn't it, Doctor?

A. Yes. May I read that portion?

Q. Yes, just read the description of the condition of the wound.

A. "There was laceration approximately a [141] 12 cm. long and 4 cm. wide over the anterior mid-shin, left, with proximal bone fragment out through the wound. There was considerable dried blood around laceration with rather strong odor but no gross infection noted."

Q. In a wound of that kind would you say early reduction would be advised?

A. I don't know that that in itself constitutes an indication for early or late reduction of the fracture.

Mr. Harr: If your Honor please, at this time I do not think there has been any testimony establishing that there was such a wound with a laceration of that proportion. It is true that it shows in this particular exhibit, but I think the record other than that and the evidence will completely refute that; that that is hearsay; and that to question the witness now as to a wound of that type, that proportion, a laceration four or five inches long, I do not think is proper.

The Court: Proceed.

(Testimony of Lee A. Craig, Jr.)

Q. (By Mr. John D. Ryan): Doctor, would you answer that last question?

(Question read.)

Q. In a compound fracture of the lower third of the left tibia, would you say that early reduction is advisable?

A. I think that is a surgical or orthopedic [142] question.

Q. In your deposition, Doctor, you said you did feel early reduction is always advisable. Could you tell why you made that statement in your deposition?

A. I was speaking of fractures in general and not necessarily this particular one, or even this particular type of leg injury.

Q. Would you tell us why fractures in general should have early reduction?

A. Just simply this: It produces a situation in which healing can go right ahead and it can heal, particularly small fractures where there is not a great deal of injury otherwise to the patient, you would perhaps reduce the fracture on the spot.

Q. In a compound fracture what is particularly dangerous—what is it you need for an early reduction?

A. I think that takes us in the technical area of discussion. I do not think I am qualified to answer the question, at least to say in the light of this particular fracture.

(Testimony of Lee A. Craig, Jr.)

Q. Are you saying early reduction is not advised in a fracture of this type?

A. It may be in some fractures of this type.

Mr. Luckey: We have a situation here, your Honor, in which a man is brought to a hospital with an injured back, and the possibility of shock is indicated. Then, in addition, he has a compound fracture to the leg. I think if Counsel [143] wants to elicit this information from the witness he should frame a proper question based on all of the facts in the case, not just on some.

The Court: All expert testimony is very unsatisfactory, as far as I am concerned. This gentleman has handled himself quite well. When a question is asked that he feels he is not competent to answer, he can say so.

Hurry along, gentlemen. You are dragging this case out too far.

Mr. John D. Ryan: Your Honor, I have no further questions in this field. I am not certain whether this man was subpoenaed to testify as an adverse witness. I have no further inquiries at this time.

Mr. Harr: I suppose your Honor will determine in your own mind whether or not he is a so-called expert witness, or is adverse.

The Court: You will have to guess what is in my mind, Mr. Harr.

(Testimony of Lee A. Craig, Jr.)

Cross-Examination

By Mr. Harr:

Q. Earlier in your testimony you were questioned about the use of orthopedic specialists in special cases, and you developed the fact you could call Dr. Kimberley. You developed further that you had other specialists in other [144] fields that were available for calls, in case you felt the need. Was Dr. Kimberley or were any of these specialists on salary, full or part-time? A. No.

Q. They were strictly on a fee basis, and would be paid when and if called for the time that they devoted, is that not true? A. Yes.

Q. On direct examination emphasis was laid upon the fact of the fractured leg, and there was little, if any, discussion of the back.

I think at one point you said that the leg—that the thing that needed to be done with the leg was to reduce the fracture and put it in a cast. You made that as a general statement as the thing to be done.

Did you also have in mind the back condition, and think that of necessity something would have to be done to the back?

A. I don't think we discussed the back as such. I don't think we insisted that the back be placed in a cast, no.

Q. What injuries at that early stage did you consider to be the most serious?

A. During the period of the first 24 hours I

(Testimony of Lee A. Craig, Jr.)

would say the back injury produced symptoms that were more serious than perhaps his leg injury. [145]

Q. You knew, of course, the fact that an ileus did result? A. Yes.

Q. And was treated? A. Yes.

Q. You made your rounds of the hospital in the morning, is that right? A. That is right.

Q. What about other periods during the day? If anything developed where a patient's condition had deteriorated, what was the practice?

A. The practice would be that the patient would be checked either by Dr. Stalder or Dr. Schneider, one of the residents at the hospital, and we would be called at the office, just as any physician would.

Q. Is that the general practice with your office and also with all doctors generally? Is that not true? A. Yes.

Q. You are a member of the Multnomah County Medical Society, are you not? A. Yes.

Q. And you were at the time of this accident?

A. No, I was not then.

Q. And you received no such calls on either the afternoon of the 10th or the 11th, is that correct?

A. Other than the call from Dr. Schneider there initially, [146] on the 10th, I did not receive any further calls either that evening or that next day, no.

Q. Therefore, you had a right to assume that the patient was progressing satisfactorily?

A. Yes.

Q. At the time you visited him on the morning of

(Testimony of Lee A. Craig, Jr.)

June 11th, did the records and charts and X-rays at the time indicate to you that there was any other treatment that he should be given other than what Dr. Schneider had previously ordered?

A. No, not at that time.

Q. I assume you did check the charts and X-rays? A. Yes.

Q. And you were satisfied with the orders as given? A. Yes.

Q. Counsel asked you whether or not you looked at the wound. Since he was put in there and was going through this course of treatment to alleviate his pain and stop the ileus condition, would it have been advisable to have opened the wound, opened the bandage and looked at the wound, from the information Dr. Schneider gave you and from what the chart showed?

A. No, I think it would have been harmful.

Q. In the first place, it would have removed the immobilization that had been planned, is that not right? A. Yes.

Q. And, further, I suppose it would have exposed it to [147] further contamination of the air, is that right?

A. Possible infection, yes.

Mr. Harr: I think that is all.

Mr. John D. Ryan: No further questions.

(Witness excused.) [148]

AMOS R. MORIN

the Plaintiff herein, produced as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. You are Amos R. Morin, the plaintiff in this case? A. Yes.

Q. How old are you? A. 45.

Q. What is your employment?

A. I work for the U. S. Engineers on the Dredge Wahkiakum.

Q. What is your job down there?

A. I am Third Mate.

Q. How many children have you?

A. I have six.

Q. You are married and your wife has testified here before? A. Yes, sir.

Q. Where do you live?

A. 4640 Northeast 30.

Q. How long have you been working with the U. S. Engineers? A. Six years.

Q. Was that in one period of service?

A. I had served in the Navy twice. I got my ten-year pin when I was up in the Seattle hospital.

Q. What sort of duties did you perform in the Navy? [149]

A. My first hitch that I put in, I was a musician; the second hitch I put in during the last war, that was in underwater explosives.

(Testimony of Amos R. Morin.)

Q. Since your Navy training, you have worked with the U. S. Engineers, is that right?

A. Yes.

Q. Previous to your Navy work, what type of employment had you had?

A. I worked in mines in Colorado and Utah and Nevada, hard rock mines.

Q. What kind of mining?

A. Hard rock mining.

Q. Would you give us some idea of your duties as Third Mate on the Dredge Wahkiakum?

A. Well, we walk the floating plant when we are digging to see that everything goes right, and walk the pipe line, and run the machinery, and whatever comes up.

Q. Could you tell us about how far you fell at the time you fell on June 10, 1952?

A. Well, I fell about 10 feet, I think it was. You could see the track of the ladder where it slipped out down the side of the house. I measured it afterwards, and it was just at 10 feet.

Q. This was at your house in Portland where you had just fallen? [150] A. Yes.

Q. Tell what happened when you fell?

A. I was up there, painting underneath the eaves of our house, and the windows—well, earlier in the morning, just about an hour before I fell, it became a little showery, so I got down from the ladder and went in the house and got a cup of coffee and went back out to paint, climbed up the ladder, and was up the ladder when I noticed that the ladder had

(Testimony of Amos R. Morin.)

slipped out, it looked to be about 4 inches. I just glanced down at the bottom of it and thought I had better go down and fix it.

I started down and just took one step when the bottom of the ladder kicked out and my leg went through the rungs of the ladder—it all happened so quick.

Q. When you fell to the ground, what happened?

A. I fell in a sitting position and my leg was through the rungs of the ladder, and a rung was across my shin-bone, and I knew as soon as I lit that that leg was broke, because I heard it snap; you could just hear it, so I called for the boys and I rolled over on my side. They lifted up the ladder and I pulled my leg out and then I looked at my leg.

Q. What did you see?

A. I seen the bone sticking out. It looked bad to me—about an inch or an inch and a half.

Q. Was there blood down there? [151]

A. Yes, it was bleeding pretty bad.

Q. You were fully conscious, I take it, from what you are saying? A. Yes.

Q. Where was your body? Was it on the grass or sidewalk, or how was it lying?

A. I think my—I think I stepped right on the edge of the sidewalk and then when I laid back—it is only about a two-and-a-half-foot sidewalk—it put my head right in the edge of the flower bed.

Q. Do you recall the doctor coming out there?

A. Yes.

(Testimony of Amos R. Morin.)

Q. Who was that? A. Dr. Done.

Q. What did he do for you?

A. He gave me a shot of something. I guess it was a sedative; I couldn't say; and he put a tape on my forehead.

Q. Can you tell us or show us on the left leg where the bone protruded, which side of your leg?

A. It is on the left side.

Q. Is there a scar there where you are pointing?

A. Yes.

Q. You are pointing to your left leg. Would you pull your pants leg up? A. Yes. [152]

Q. You are pointing to your left leg, on the outside of your left leg and running up to the top of it?

A. Yes.

Q. How long is that scar?

A. I would say three inches.

Q. Is that the place where you recall the end of that bone sticking out? A. Yes.

Q. Is that the scar there? A. Yes.

Q. Tell us where the cut was or where the surgery was done? A. Here (indicating).

Q. The scar you are pointing out now?

A. Yes.

Q. Do you recall what next happened to you? Were you taken to the Physicians and Surgeons Hospital?

A. Yes. I only had my young boys there, but I tried to direct them in what should be done. I told them—one of them should go and get a doctor and the other one should get a blanket for me to cover

(Testimony of Amos R. Morin.)

myself up with, any my daughter came up then and I told her to get hold of an ambulance. They asked me where I wanted to go, because I had Blue Cross and I was a veteran, and I also was insured through the Public Health Service at Physicians and Surgeons Hospital, so I told [153] them to take me to Physicians and Surgeons Hospital. They were surprised that that is where I was going.

Q. Do you have any idea how long it was before the ambulance picked you up?

A. No, I don't. It seemed like it was about 15 minutes, but I couldn't say.

Q. Could you tell us when this accident took place?

A. Just a little after dinner time, a little after noon.

Q. Dinner time is noon to you? A. Yes.

Q. You were taken by ambulance, then?

A. Yes.

Q. Were you conscious when in the ambulance?

A. Yes.

Q. Could you feel the effects of the ride at all?

A. No, not too much, but I kept telling the ambulance driver, or the attendant, to please hold my leg—the man who was riding in back. It seemed like it would bounce off the table or bed that I was in.

Q. Were you in pain? A. Very much.

Q. Were you pain both in your back and leg?

A. Mostly in my leg.

Q. When you got to the Physicians and Sur-

(Testimony of Amos R. Morin.)

geons Hospital, can you tell us what you remember about what happened to you [154] there?

A. Well, I can tell you as far as I remember. I went in there. I remember going into the emergency room. They put me up there on the table in the first-aid room and pulled up my trousers—I don't know which doctor it was. I don't recall—I never seen him before or since—and he says, "Mr. Morin, we are going to have to cut your trousers off."

I said, "Go ahead and cut them off, but please hold my leg. It is just about to bounce off the table." So that is the end of my recollection.

Q. That is all you remember? A. Yes.

Q. Did you pass out just from shock, or were you given further sedation?

A. I was given further sedation, and my back was pretty bad then.

Q. That is all you recollect, then, on June 10, 1952, is that right? A. Yes.

Q. Prior to passing out? A. Yes.

Q. After the time you saw your leg when lying on the ground after you fell, did you have reason to look at your wound or your leg again?

A. Yes, I looked at it the second time when I was in the [155] ambulance. It seemed like it took the ambulance quite a while to get there; it seemed long to me, anyway, and I looked at my leg again.

Q. What did you see that second time?

A. I seen for sure that bone was sticking out—a compound fracture, and the bone was protruding.

Q. When you say "compound fracture," did you

(Testimony of Amos R. Morin.)

know what a compound fracture was at that time?

A. Yes.

Q. How did you happen to know that?

A. I hold a first-aid card, an advanced first-aid card.

Q. You were aware of what was the matter with you?

A. Yes.

Q. After you passed out in the emergency room, can you tell us what you next remember about your treatment?

A. Nothing, sir. I don't remember nothing. Sunday evening I got up—I woke up and found myself in Seattle. That was my next recollection.

Q. That is Sunday evening, June 15, 1952?

A. Yes.

Q. Do you recall anybody talking to you after you passed out in Physicians and Surgeons Hospital in Portland?

A. No.

Q. Would you tell us what your general condition was when you woke up on June 15, 1952? [156]

A. Well, I was a pretty sick boy and the orderly was in there and he says, "Boy, you had better get some liquids down you," and the wife was there and she kept pouring liquids down. It was all still hazy Sunday evening. I don't remember too much. I did recognize my wife and my oldest daughter who had come up there to see me.

Q. Were you in a cast?

A. Yes, I was in a full body cast and a full leg cast.

Q. Were you aware of any pain in your leg?

(Testimony of Amos R. Morin.)

A. Yes, sir. I told my wife that Sunday evening—it was either that Sunday evening or the next Monday morning when she came in—I think it was on Sunday evening—that my leg wasn't set; it was still wriggling around.

Q. Was your back in a body cast?

A. Yes, it was in a body cast.

Q. Did you have reason to observe your arms or your head?

A. My arms was bruised and the top of my head was all skinned up, around my neck.

Q. After this, could you tell us what took place at the hospital? Did you remain in bed?

A. The next morning—that would be Monday morning—Dr. Brown came in to see me, and he was the doctor I was turned over to when I got there in the ward—I was in a private room, and he came in in the morning, and he said, “Well, I see you are awake,” and he said, “What kind of [157] doctors have you got down there in Portland, to send a man up here in your condition”? And that is all he said. I didn't feel like talking either, but that morning I did tell him that I didn't believe my leg was set, that I felt like it was still moving around, and he said, “Well, we will check that.”

Q. The record shows that you had a further operation on July 13, 1952, up there in the hospital?

A. Yes.

Q. Did they tell you what they had done to you when you came into the hospital, the United States Marine Hospital?

(Testimony of Amos R. Morin.)

A. Please explain that again.

Q. Did anybody tell you what was done to you when you were brought into the Marine Hospital on June 12, 1952? A. No.

Q. Between June 12, 1952, and July 13, 1952, did the hospital give you any further treatment to your leg directly?

The Court: June and July?

Mr. John D. Ryan: Excuse me, your Honor. It was between June 12, 1952, and July 13, 1952.

The Court: July?

Mr. John D. Ryan: Yes, your Honor. I believe the record shows that on July 13, 1952, this gentleman had a further operation at the U. S. Marine Hospital.

The Court: When did he have this talk with Dr. Brown? [158]

Q. (By Mr. John D. Ryan): When did you have this talk with Dr. Brown?

A. It was on the Monday morning after I got in there.

Q. After you got there? A. Yes.

The Court: In June?

Q. (By Mr. John D. Ryan): In June?

A. Yes.

Q. That would be June 16, I believe, 1952?

A. Yes.

Q. After that the cast remained on your leg?

A. Yes.

Q. Did they do anything to the cast?

(Testimony of Amos R. Morin.)

A. They cut a window in it. I think I was scheduled—I don't know for sure, but I think I was scheduled for an operation on a Wednesday before the Friday that I was operated on, and they cut a window in there on a Monday, Monday morning—I don't remember the date.

The Court: Are you talking about July, now?

The Witness: July.

Q. (By Mr. John D. Ryan): You are talking about July? A. Yes.

Mr. John D. Ryan: I just want to clarify this for your Honor.

The Court: I understand now. It was in [159] July.

Mr. John D. Ryan: Yes.

A. They cut a window on a Monday, and the bones wasn't set; they was up on top of one another, and they said I would have to go back—they took my body cast off, and I think it was that Monday when they cut the window in my leg cast. I told the doctor—I don't know whether it was Dr. King or who the doctor was—it seemed to me like it was a little short, heavy-set fellow that had my case before Dr. King got there. They took my body cast off, and there wasn't any pain, it didn't hurt. I said to whoever the doctor was—I don't remember whether it was Dr. King or who it was. I said, "We don't have to put another one on, do we"? And he said, "No, I don't think you are going to have to have one."

They took me up Friday and when I woke up out

(Testimony of Amos R. Morin.)

of that, I had another body cast on and another leg cast, and after that he told me that they had to put a plate, an Egger's plate, and a bone graft in my leg, at the time they cut this window in that cast.

Q. You say there was no pain. Are you referring to your back or leg? A. My back.

Q. What was the condition of your leg at that time? A. It was hurting.

Q. Will you describe the effect of the pain? [160]

A. It was a throbbing pain. It just seemed that it was throbbing all the time. They kept me under pretty heavy anesthetic all the time.

Q. Were you pretty doped up all the time you were there? A. Yes.

Q. When they cut this window in the cast, did they give any treatment to the bone part of the wound? A. I don't know.

Q. Did they give you any information regarding your condition at that time? A. No.

Q. That would be July 13, 1952?

A. Yes.

Mr. Harr: This line of testimony I suppose is directed to the history of the case. There is no contention made of any wrongdoing in the Seattle hospital.

The Witness: That is right, sir.

Mr. Harr: As the pre-trial order sets forth, the entire claim is predicated on the wrong treatment, if any, during the 40 hours he was in Physicians and Surgeons Hospital in Portland. This is just the history you are developing now?

(Testimony of Amos R. Morin.)

Mr. John D. Ryan: The purpose of this questioning, of course, is to fully develop and show the subsequent course of the man's condition in order to relate it to what we contend was improper treatment in Portland. [161]

Q. After the operation, which was on July 13, 1952, or thereabouts, what was your condition?

A. It wasn't good.

Q. Did you have a cast on your leg when you came down from surgery? A. Yes.

Q. Would you describe what happened after that, as far as the cast on your leg was concerned?

A. I came out of my anesthesia, I think it was, Saturday evening, and my leg was hurting terribly bad. It was all bloody and soaked through, and I asked the nurse Sunday morning if she would get Dr. Walker for me.

Dr. Walker came up Sunday afternoon and cut my cast open, and rebound my leg and taped the cast back on.

Q. After that did you keep that cast on, or what?

A. No, I think they took me up, if I remember right—they took me up and put another cast on the following week.

Q. Would you describe for us what happened to you, as far as your treatment was concerned?

A. They kept me in that cast for, I think, about a week, if I remember right. Then they cut a window out. It was hurting pretty bad, so they cut a window in there where they had put the plate, and it just

(Testimony of Amos R. Morin.)

started splitting, and they couldn't hold it. It seems like they wasn't getting anywhere with it. [162]

Q. Did they discuss this condition with you?

A. Yes, Dr. King came in there and I asked him, "How about me going back down and going in the Veterans Hospital or going in some other hospital where I can get an orthopedic specialist on the leg?" And he said, "Well, we can see about it," so he did send me out to the V. A. man from Seattle and the V. A. man from Seattle said they didn't have room because the hospital wasn't finished yet—the V. A. Hospital wasn't finished up there as yet—and he said if I could pay my way back down the V. A. in Portland district would—I could more than likely get in down here, so I decided that is the time I should leave up there, because I wasn't getting anywhere up there.

Q. You were able to pay your way back? You had sufficient funds?

A. Yes. I was in a full body cast and a full leg cast.

Q. When they cut this window in the cast on your leg, about how long after the Egger's plate was put in was that done?

A. Not quite a week.

Q. Did they leave a window in the cast?

A. Yes.

Q. Did they give you any treatment?

A. Yes, I was always getting penicillin or whatever it is, some antibiotic or whatever it is.

Q. Was there any possibility for you to see the site of your [163] wound?

(Testimony of Amos R. Morin.)

A. Oh, yes. I could look at it.

Q. What was its condition at that time?

A. It looked pretty rough to me. It looked pretty rough to Dr. King, too. I think he will say the same thing.

Q. Did he tell you anything about it?

A. He said——

Q. What did he tell you?

A. He said if this don't improve pretty soon there would be a chance that it might have to be amputated.

Q. Did he say the leg was infected?

A. Yes.

Q. That conversation took place about a week after the operation?

A. About a week or ten days after the operation.

Q. At this time what was the condition of your back?

A. My back was all right, but it was still in a cast. They had it in a cast.

Q. Were you able to get up out of bed at any time?

A. I got up on one of these things they call a Gunner's cart, a four-wheel cart is what it is.

Q. Did you continue to have the window cut in your cast, or did they change the cast after the window was cut?

A. No, I don't think there was a change made in the cast any more. [164]

Q. According to your recollection, sometime, a

(Testimony of Amos R. Morin.)

week or ten days, after the operation of July 13, 1952, you had a window cut in your cast?

A. Yes.

Q. Did they treat you with hot packs?

A. Yes, hot packs.

Q. How often would they treat you with those hot packs? A. Three times a day.

Q. Did they continue those during the duration of your stay at the hospital? A. Yes.

Q. Did you see any pus coming out of the wound? A. Yes.

Q. When did you see that?

A. When they first opened it up, when they first cut that window in and they got busy with the hot packs.

Q. What was the condition of your leg with regard to pain? A. Oh, it hurt.

Q. Can you tell us what kind of pain it was?

A. It was a throbbing pain.

Q. Is that the same pain you had had all the time? A. Yes, all the time.

Q. Was there any sloughing of the skin itself around the wound?

A. No. There was quite a bit of scar tissue around there. [165]

Q. You said the wound was splitting, if I understood you?

A. That is the wound down the side of my leg.

Q. Was that the wound where the incision was made or the wound where the bone went out?

A. The wound where the incision was made.

(Testimony of Amos R. Morin.)

Q. There were two separate wounds on your leg, in other words? A. Yes.

Q. Would you show us the wound where the incision was made? A. (Indicating.)

Q. That is approximately about a foot long?

A. Yes.

Q. That is on the inside of your leg, your left leg, is that correct? A. Yes.

Q. The other one we are discussing is the wound where the bone protruded? A. Yes.

Q. You have already shown that?

A. Yes.

Q. Was there any sloughing of the skin there?

A. Yes.

Q. You said Dr. King discussed the possibility that there might be an amputation? [166]

A. Yes; one morning when I was talking to him in there, and he said, "Boy, if you don't straighten up, we are going to have to cut that thing off; that is one thing for sure."

Q. You were able to be up in this cart you spoke of? A. Yes.

Q. Were you ever up in a wheelchair?

A. No, I couldn't sit up. I was in two casts, one on my back and my leg, and I couldn't sit down, so I rolled out of bed on this cart and that was my transportation.

Q. Pardon?

A. That was my transportation when I got out of bed.

(Testimony of Amos R. Morin.)

Q. You were in the hospital there until what date? A. August 13th.

Q. Would you tell us why you left the hospital?

A. I felt I could get better care with an orthopedic doctor down here in Portland, and also be near my family.

Q. Were you concerned about your condition?

A. Yes, I was.

Q. Did you have any discussion about your condition at the time you left there?

A. I told Dr. King I was going to leave and he said, "Well, Boy, we couldn't hold you. We can't give you our permission." It wasn't Dr. King; it was whatever person I discussed leaving with, a dark-headed fellow that came there after Dr. King had.

Q. All during this time you had a window in your cast and [167] you were getting hot packs applied? A. Yes.

Q. You left there August 13, 1952, I think the record shows? A. Yes.

Q. At the time you left was anything done to your cast? A. No.

Q. Was the window replaced in it?

A. It was in place, sealed in with tape.

Q. Had it been in place prior to your leaving?

A. They took it out when they put the hot packs on and then put it back in again.

Q. When you left the hospital, the window was back in? A. Yes.

(Testimony of Amos R. Morin.)

Q. Did you receive penicillin up to the time you left?
A. Yes.

Q. Or some kind of antibiotics?

A. Some; I don't know what it was.

Q. Tell us how you came down to Portland?

A. Came down in our car.

Q. With your wife?

A. My wife was driving.

Q. When you got to Portland, what date was that? The 13th?

A. It was the 14th, I think—the 13th, when I got to Portland, yes, early afternoon. [168]

Q. Did you seek medical care when you got to Portland?
A. Yes, the next day.

Q. Whom did you see?

A. Dr. Thorup.

Q. What did he do?

A. He started giving me penicillin, and the following day he said, "We will come up and help you up to the office so I can get X-rays." So I went down to his office on a Thursday and he had X-rays taken of my leg and also of my back.

Q. Up until this time did the cast remain sealed where the window was?

A. Yes. He opened the window at the office.

Q. I am speaking about up to the time you went to his office?
A. Yes.

Q. Did he first call at your home on the 14th?

A. Yes. He opened the window and looked at my leg that day.

Q. What then did he do?

(Testimony of Amos R. Morin.)

A. He said, "We are going to have to get you a specialist. I will get in touch with Dr. Cherry and we will turn you over to him."

Q. Did he change your cast at that time?

A. They took my cast off, and took a picture of it and then put another cast immediately back on, the very same day. [169]

Q. Was that done in his office?

A. In his office.

Q. During the next few days did you continue to get treatments?

A. Every day, the nurse gave me the penicillin.

Q. And the nurse continued to give you the penicillin? A. Yes.

Q. How many times a day?

A. Twice a day.

Q. Your leg was in a cast after you left Dr. Thorup's office after the X-rays were taken?

A. Yes.

Q. How soon was it you went to the hospital again? A. The evening of the 23rd.

Q. Did Dr. Thorup make arrangements with you for you to go to the hospital? A. Yes.

Q. When did you first see Dr. Cherry?

A. The morning of the 24th.

Q. What happened to you there? What did they do?

A. They put me under anesthesia the next morning and when I woke up I had a different cast on my leg, and when Dr. Cherry came in he said they

(Testimony of Amos R. Morin.)

had to reset my leg under pressure. I didn't question his ability at all.

Q. That was in Providence Hospital? [170]

A. Yes, Providence Hospital.

Q. Did you remain in Providence Hospital for any length of time?

A. Yes, I stayed there for about two weeks. I think that was what it was.

Q. You had a cast on your leg after the reduction? A. Yes.

Q. Then what took place when you left Providence Hospital?

A. When I left Providence and came home, then I would go back about every two weeks as an outpatient to get—well, I went back in about two weeks and it was running, sloughing or running through my cast, and I went there to see him, to see Dr. Cherry, so he said, "Well, I guess we are going to have to take that plate out," so I went back in the hospital again and they removed the plate.

Q. When was that done?

A. Oh, I don't remember the exact date.

Q. There were a number of cast changes made?

A. Yes.

Q. There was sloughing coming through the cast? A. Yes.

Q. Were you able to work during this period?

A. I went to work as a watchman over at the yard. The boss gave me a job over there as a watchman. There was just a little walking in it, and Dr. Cherry said it might not hurt, [171] and I am a poor man and I needed the work, so I went to work.

(Testimony of Amos R. Morin.)

Q. In this period that we have been talking about, how did your leg feel?

A. It hurt all the time.

Q. Could you describe the condition? Was it draining?

A. Yes, it was draining all the time.

Q. Did the throbbing continue? A. Yes.

Q. Was that the general condition of the leg during this period? A. Yes.

(Recess.)

Q. We were talking about the treatment after the first reduction in August, 1952. Did you have any further treatment?

A. Yes. I went back to work on December 8th, 1952, and I worked until January 23, 1953, and I went back in the hospital on the 25th, I think it was, for further treatment, and they removed the plate from my leg.

Q. That is the 25th of January, 1953?

A. The 26th, I think it was.

Q. It was around in that period of time?

A. Yes.

Q. This work you were doing in the meantime was as a watchman? [172] A. Yes.

Q. You drew your usual rate of pay for doing that?

A. Yes, through the kindness of the boys out there where I worked.

Q. You were in Providence Hospital this next

(Testimony of Amos R. Morin.)

time for a straight period of how many weeks after your operation in January, 1953?

A. About three weeks, I think.

Q. After that were you able to return to work?

A. I returned to work later on July 20, 1953.

Q. On all of these occasions did you have a cast on? A. Yes.

Q. Except when being treated in the hospital?

A. Yes.

Q. You did not go back to work until July 20, 1953, after your operation in January and February, 1953——

A. I went back to work, I see here, February 24, 1953, and worked until April 12—no, April 26, 1953.

Q. What then took place? Did you have to have further hospitalization?

A. I had to have further hospitalization for an infection.

Q. Where did you go? A. St. Vincent's.

Q. Under whose care there?

A. Dr. Cherry's. [173]

Q. You continued to be under Dr. Cherry's treatment? A. Yes.

Q. What took place at St. Vincent's?

A. They used some kind of heat and light; I don't know what it was. I had full trust in Dr. Cherry.

Q. Did you have your cast removed up there while you received this treatment? A. Yes.

(Testimony of Amos R. Morin.)

Q. What was the condition of your leg at that time?

A. It was infected pretty bad.

Q. Was it draining? A. Yes.

Q. Was there pus? A. Yes.

Q. Was there an open wound? A. Yes.

Q. After your term at St. Vincent's, what then took place?

A. I came home for a while and then I went to the Veterans Hospital.

Q. When in a cast? A. Yes.

Q. Were you in a cast when you came home?

A. Yes.

Q. Was the wound covered by the cast?

A. Yes. It had a window in it. [174]

Q. Had a window? A. Yes.

Q. Did you continue to see Dr. Cherry for treatment? A. Yes.

Q. How often would you see him?

A. About twice a week, I think it was, maybe once a week.

Q. What was the condition of your leg with reference to pain at this time?

A. It hurt terribly bad.

Q. Who advised you to go to the Veterans Hospital? A. Dr. Cherry.

Q. What was the nature of his advice regarding that?

A. Well, I run out of my Blue Cross insurance; I didn't have any money; I was a veteran and I

(Testimony of Amos R. Morin.)

could go there, and he said, "Your best bet is up there."

Q. Were you treated by one of Dr. Cherry's colleagues? A. Yes, Dr. Davis.

Q. Did Dr. Cherry continue to see you?

A. Yes, he came up to the hospital and seen me at least for a couple of weeks.

Q. At the Veterans Hospital? A. Yes.

Q. When you went to the Veterans Hospital, what was done to you there?

A. Oh, on the first operation they went in there and they [175] scraped the bone and they debrided it.

Q. I notice on the record here of the Veterans Administration that you had what they call a sequestrectomy of the left tibia on May 11, 1953.

A. Yes.

Q. It that about the date of your first operation up there? A. Yes.

Q. And that on May 27, 1953, you had a skin graft, pedicle, first stage, from right to left. What was done in that operation, do you recall?

A. They went in again and scraped the left leg, and then they cut a flap of skin off my right leg, and put me in a cast with my legs crossed, and I was that way for six weeks.

Q. That was the second operation you had up there? A. Yes.

Q. Was flesh removed from your right leg?

A. Yes.

Q. Can you show us the spot or spots where the

(Testimony of Amos R. Morin.)

skin was removed? A. Yes.

Q. Has that healed over?

A. Pretty well.

Q. I would like to describe it as a concave removal of flesh from the calf of the right leg, approximately six inches [176] in length and about three and a half to four inches in width. Is that about right?

A. Yes. It has healed over, but it is still very tender.

Q. The record also shows that on May 27, 1953, you had a skin graft, split thickness, left thigh to left leg. A. Yes.

Q. Is that site healed now?

A. Yes, it is healed.

Q. Is there any scar there?

A. Yes, there is a scar. The surface of the skin was cut off.

Q. You had a further operation on June 29, 1953, a skin graft of the right calf. Was that in the same site as you pointed out as to the right calf?

A. Yes.

Q. Did you have a skin graft made from any other portion of your body?

A. I had a total of fifteen skin grafts.

Q. Done at different times?

A. At different times.

Q. You mentioned your right calf.

A. The right calf, my buttocks, my left calf and then back up right here (indicating)——

Q. Those were all for grafts to the site of your

(Testimony of Amos R. Morin.)

original wound? [177] A. Yes.

Q. It is indicated by the record that the last of these grafts was taken in February, 1954. Is that correct? A. Yes.

Q. Have you had additional hospitalization since then? A. No.

Q. You have been under no treatment since then?

A. I go up every week to Dr. Cherry.

Q. Have you been able to work?

A. I started to work April 1st, 1954, and up to the present date I have been able to keep on. I watch what I am doing and protect my leg. I use a heavy bandage over my left leg to keep it from barking up. I watch myself, and I get my wages anyway.

Q. At the present time do you have any pain in your left leg? A. Very much.

Q. Very much? A. Yes.

Q. Would you describe the type of pain you suffer?

A. It just hurts; throbs and pains real deep. I can't exactly describe it.

Q. Is there any drainage from the site of the wound? A. It still drains, yes.

Q. It is still draining? [178] A. Yes.

Q. With regard to the use of your left leg, do you have to guard it? A. Yes.

Q. Are you able to walk?

A. Yes, if it is not too far or too rough. I can't run.

Q. Do you feel fatigue in your left leg?

A. Yes.

(Testimony of Amos R. Morin.)

Q. Is it greater than previous to your injury?

A. Yes.

Q. Have you any weakness in your ankle or your lower left leg?

A. That hurts me quite a bit.

Q. How about the right leg where the skin graft has been taken?

A. That don't bother me too much; it is just tender. It is still tender. It is tender yet, but it don't bother me too much.

Q. Mr. Morin, you worked as Third Mate on the Wahkiakum and you are presently doing that work, is that right?

A. Yes.

Q. How much longer do you have before retiring from that job, which is a civil service job?

A. Ten years.

Q. Ten years? [179]

A. Or twelve years.

Q. What do you make, approximately, a month at that job?

A. About \$450, bring-home pay.

Q. Will you describe to us how you are able to do your work on the job?

A. Since April I have done it; I try to hold up my end of my work. It hurts sometimes, but you have just got to do it.

Q. Does your left leg limp when you walk?

A. Slightly. I try not to show it because I don't want my boss to know it.

Q. Is your job a pretty active job?

A. Yes, it is.

Q. Describe the type of your activities?

A. I have quite a bit of walking, quite a bit of

(Testimony of Amos R. Morin.)

lifting and pushing pipe and running the machinery, and jumping up and down.

Q. Do you notice any difficulty in doing that over your former ability to do it before you had this injury?

A. Oh, I have got to be very careful of the way I do it. I do it, but I do it in a different way now.

Q. Would you tell us how you do it by a different way?

A. I usually try to have a support to hang onto; use one hand to hang on when I jump down. I can't run. I have just got to walk and get there that way.

Q. With regard to your private life, were you athletic, [180] athletically inclined, or engaged in sports? A. Very much.

Q. What were those sports?

A. I loved to play tennis, go hunting and fishing. I played football with the boys and we played indoor baseball; used to play every Sunday.

Q. Are you engaged in those sports now?

A. No.

Q. Do you play tennis? A. No.

Q. Did you play tennis previously?

A. I did.

Q. Are you able to play that at all now?

A. No.

Q. How frequently did you play tennis?

A. Once a week anyway.

Q. Do you live near a park? A. Yes.

Q. There was some mention of dancing in your

(Testimony of Amos R. Morin.)

wife's testimony. Were you and your wife accustomed to go dancing?

A. We used to go out at least once a month, more than that sometimes.

Q. Are you able to dance at all? A. No.

Q. Have you attempted to do it? [181]

A. No, I have not.

Q. Your boys, I believe, said that they enjoyed swimming. Did you go swimming frequently in the summer?

A. In the summer, yes. Of an evening, we used to go out——

Q. Where did you go?

A. The Sandy River and out on the Columbia.

Q. Have you been able to enjoy that sport since the injury?

A. No, because my leg is still paining. I don't want to run any chances.

Q. What have you been told with regard to whether you will need any further treatment?

A. I am due to have—the doctor said that I should have a sequestrectomy. What that is I don't know, but that is what the doctor told me.

Q. Who told you that?

A. Dr. Davis and Dr. Cherry. Dr. Davis is chief at the Veterans Hospital, and he is with Dr. Cherry.

Q. In the pre-trial order it is set out that you had a wage loss of \$6,388.32 since the time you fell from the ladder at your home. Is that a correct computation you made of the amount of wages you have lost?

(Testimony of Amos R. Morin.)

A. No, not quite. I see here when I worked it out I added \$781 to the time that I worked, to the total amount, which should not have been. I lost \$5,607.

Q. That is what you estimate your wage loss to be? [182]

A. Yes.

Q. Would you repeat that figure, please?

A. \$5,607.12.

Q. Mr. Morin, without taking the time to go into all the details of your wage loss, since Counsel and I have prepared a statement setting forth all of that, would you tell us about the annual leave in your work?

A. Annual leave is on a basis of two and a quarter days per month, which builds up to a certain amount every year. You can't get over 21 days in one year, but your sick leave, which mounts up to two and a half days per month, will carry on and build up just as far as you want it to go.

Q. As to your cumulative annual leave of two and a half days a month, are you able—are you paid when you take that?

A. Yes. You have to take your hours of accumulated leave—you take it any time you want to take it if it is satisfactory with them, satisfactory with your skipper or your boss aboard your vessel.

Q. Would you tell us what sick leave is?

A. If you are sick at any time, when you are not able to report to work, you are allowed two days' sick leave. Over that amount you have to have a doctor's certificate stating why you are ill over that length of time, to start back to work. [183]

(Testimony of Amos R. Morin.)

Q. Those first two days are on pay?

A. They are all on pay, but you are allowed two days on pay without a doctor's certificate.

Q. Is there a limit to the amount of sick leave you can take?

A. The amount you have built up.

Q. How do you build up your sick leave?

A. Two and a half days a month.

Q. Two and a half days a month sick leave?

A. Yes.

Q. What happens after you use up the accrued sick leave you build up by reason of your service?

A. You go on leave without pay.

Q. How long can you be on leave without pay?

A. That is up to the discretion of the master.

Q. Based on your condition, whether justifiable or not? A. Yes.

Q. Is there any limit to the amount of time you can take off from your job without losing your job?

A. Yes.

Q. What is that limit?

A. The time set by the head of your department, and how they feel as to how long you shall be off.

Q. That applies to the individual case, then?

A. Yes. [184]

Q. Has there been a time set, as to how much time you could take off your job?

A. Yes. I had to be back to work by April 1st or else lose my job.

Q. Has there been any further discussion with

(Testimony of Amos R. Morin.)

your superiors with respect to future absences for sick leave?

A. As yet, no. I have 19 months work before I pay back what I owe them for advancing me sick leave when I was up in Seattle. I have to pay that back, 30 working days of sick leave.

Q. You have to pay back these 30 days of sick leave?

A. Yes, before I can get any more sick leave accumulated.

Q. Did you get sick leave or vacation leave during any of the time you were off?

A. Yes, I had annual leave when I was—I used up my sick leave and then they allowed me 30 days more sick leave up in Seattle, and then I had from 9/18/52, to 10/2/52, annual leave coming, and I used that up. That is all I had.

Q. Did you lose any time during this period when you did not have any leave coming?

A. Oh, yes.

Q. I believe that will be revealed in the information we have? A. Yes.

Mr. John D. Ryan: No further questions. [185]

Cross-Examination

By Mr. Hair:

Q. Since we are talking about the time lost, your claim against the Government begins from the date of your injury, is that right? A. Well——

Q. Your contention in the pre-trial order is that

(Testimony of Amos R. Morin.)

you claim time lost from June 11, 1952, until September 18, 1952, a total sum of \$1,255.80. You want the Government to pay you for that, don't you?

A. Well, I would say, sir——

Q. I think you can answer that by yes or no. It is part of your claim, is it not?

A. I am trying to be fair about this, sir.

Q. Is it or isn't it? Say yes or no, and then you may clarify it.

A. I will say, yes.

Mr. Thomas H. Ryan: You go ahead and explain.

Q. (By Mr. Harr): Yes, you may explain if you want to.

A. I would say my injury, if I had been treated properly, would have taken six months. I am asking pay for the time of my injury, for the reasonable length of time until I should be well.

Q. That is the first time loss you had, from June 11th to September 18. You drew on your sick leave first, didn't [186] you? You exhausted your sick leave?

A. I had very little sick leave coming at the time of my accident.

Q. A note that we have from one of your employers says that from June 11, 1952, to September 18, 1952, you were allowed that for sick leave but it included the 30-day advance?

A. Yes, that is sick leave.

Q. And then from June 11th to August 18th was sick leave you had accumulated. That is right, isn't it?

A. June 11th to September 18th?

(Testimony of Amos R. Morin.)

Q. June 11th to August 18th?

A. No, sir. That is figured on a five-day week, so that would be six weeks of sick leave that I was advanced. It is not figured on a seven-day week. It is figured on a five-day week.

Q. I think you are right about that.

A. Yes.

Q. In that first bracket you were paid the sick leave that the Government allowed you?

A. That was just a loan.

Q. Now, you say that the Government should pay you that again. I would like to know why.

A. I just got through saying, sir, that I figured that in six months, if I had had proper treatment, six months would [187] have been plenty for this injury. I am asking only for six months taken off for this injury to heal and be back to work.

Q. All right. Assuming that, if you had been back on your job in six months, and according to your version the treatment would have been highly satisfactory in every way to you, you would still have used up the sick leave, wouldn't you? You could not have your sick leave once and then get it again, could you?

A. No.

Q. You shake your head, "No."

A. I said no, sir.

Q. Why do you make another claim, now, for that sick leave?

A. I just got through telling you, sir, I would allow six months total for rehabilitation, to get back on my feet and get back on the job. They asked me,

(Testimony of Amos R. Morin.)

when I made out this slip, to find out the total time I was sick, the total time I lost during the time I was sick. That is what I have done.

I am saying that if I had gotten the right treatment at the Physicians and Surgeons Hospital, I would have been back to work easily in six months' time.

Q. From June 10th to December 10th, six months—— A. Yes.

Q. So, had you received proper treatment, in your view, during that period, you would have been at work and, therefore, [188] you would have had no claim against the Government?

A. If I had got the right treatment, then I don't think I would have had this trouble.

Q. Then I will ask you this question: Had that occurred, you would have used up all of your sick leave, and you would have used up all of your annual leave up to that point and you would also still have to pay back 30 days' advance sick leave that they granted. That is true? A. Yes, you are right.

Q. So, now, because of the fact you figure you did not get the treatment you should have, you are asking the Government to pay you all the wages you would have otherwise earned?

A. I have not, sir.

The Court: Don't waste time. He is claiming after December 10th, beginning December 10th.

Mr. Harr: Very well, your Honor.

The Court: Isn't that what you say?

The Witness: Yes.

(Testimony of Amos R. Morin.)

Q. (By Mr. Harr): You made the statement that you had three sources of treatment, the Blue Cross, the Veterans Administration, and then you said, "I am insured through the Public Health Service." A. Yes, sir.

Q. You do not mean to imply that there is an insurance policy? [189]

A. We are covered by the Seamen's Act for hospitalization and doctors.

Q. Yes. There is a statute that requires the Public Health Service to give treatment to sailors. That is true, isn't it? A. Yes.

Q. You being a man aboard a dredge, you are so classified as being a seaman? A. Yes.

Q. So the treatment is available to you if you want it? A. Yes.

Q. And that is by statute, isn't it? A. Yes.

Q. What you meant was that you merely had that as insurance to rely on? A. Yes.

Q. You could get it if you asked for it?

A. Yes, that is right.

Q. You did ask for it in this instance, didn't you? A. Yes.

Q. This Dr. Brown you spoke of talking to in Seattle, did you know he was one of the exchange doctors who had come from some other area?

A. At the time I didn't know anybody.

Q. He was a Negro doctor, wasn't he? [190]

A. Yes, he was a Negro doctor, but at the time I knew nothing——

The Court: He was what?

(Testimony of Amos R. Morin.)

Mr. Harr: A Negro.

The Witness: He was a Negro doctor.

The Court: What?

Mr. Harr: A Negro doctor, your Honor.

The Court: What difference does that make?

Mr. Harr: It makes no difference at all.

The Witness: I didn't know him. What was your question?

Q. (By Mr. Harr): Well, he was an exchange doctor?

A. I don't know whether he was an exchange doctor. I didn't know until——

The Court: What is an exchange doctor?

Mr. Harr: A doctor, your Honor, coming from some other Public Health Service. They exchange as school teachers exchange. It has no significance. In other words, he was not on the regular staff.

Q. You entered the Seattle hospital June 12, 1952, and your leg was treated and a cast applied. Then the cast was removed, wasn't it? First, a window was cut in it and then the cast taken off.

A. On the Monday before July 11th, they bi-valved it and then they put it back with tape. [191]

Q. That was on July 9th, as the record shows.

A. Yes.

Q. Would that be about right?

A. I think so. I don't know the exact date. You have that information.

Q. The record indicates that on July 9th, the cast was bi-valved and padded, is that right?

(Testimony of Amos R. Morin.)

A. If that is what is on the record, that must be correct.

Q. And that night you tore the cast off, didn't you? A. No, sir.

The Court: What date are you talking about?

Mr. Harr: July 9th.

A. No, sir.

Q. (By Mr. Harr): You did not?

A. No, sir; not to my recollection; I never removed a cast in my life. I don't see how I could.

Q. The record indicates that this cast remained off until July 11th, when you went under general anesthesia. Was the cast off, then, those two days?

A. Yes.

Q. That is when they performed the bone graft?

A. Yes.

Q. Did you see that bone during those two days?

A. Through the window that they had cut in it. On my leg, are you speaking of? [192]

Q. Yes, during the two days the cast was off.

A. No, the cast wasn't completely off at any time. It had a window in it and bi-valves were cut down the side. They came in on a Monday and bi-valved my cast at Seattle.

They was figuring on taking me on a Wednesday, but something came up—I wouldn't know what—and they said they couldn't get to me, so they were going to take me up on Friday. Until the time it was bi-valved, it had a window cut in here (indicating).

Q. But the cast was still on your leg?

(Testimony of Amos R. Morin.)

A. The cast was still on my leg.

The Court: What is the word he used, bi—what?

Mr. Harr: “Bi-valved.”

The Witness: It is a slit right down the side.

Q. (By Mr. Harr): You mentioned on your direct examination, Mr. Morin, two or three places, something to indicate—one would get the conclusion you were rather upset or unhappy with the treatment you were getting at Seattle; that is true, isn't it?

A. Not the Seattle treatment. I was just unhappy at my condition. I figured I could better myself by going to an orthopedic specialist.

Q. Are you saying that in that big institution, the Marine Hospital, they did not assign doctors to you in whom you had any confidence at all? Is that right? [193]

A. I have nothing against the Marine Hospital. I have got nothing against it.

Q. You suggested you were just wasting your time. You figured you were not getting anywhere, I think you said. That was one of your remarks.

A. I would be better satisfied in Portland with my family and under an orthopedic specialist.

Q. Is Dr. Thorup still your family doctor?

A. Yes.

Q. He is still in Portland?

A. He is taking a nice vacation over in Switzerland.

Q. You spoke about your operation by Dr. Cherry. That was in January, 1953? That is right,

(Testimony of Amos R. Morin.)

isn't it? A. January 26th, I believe it was.

Q. You mentioned that there was sloughing and matter coming through the cast.

A. There was sloughing before, when Dr. Cherry took over.

Q. Your leg was in a cast, wasn't it?

A. It had a window in it.

Q. You saw the wound before that time?

A. Oh, yes.

Q. Had the cast been removed completely before that time? A. What date?

Q. January of 1953.

A. It was removed by Dr. Thorup on August 15, 1952, when he took a [194] picture and put another cast immediately back on.

Q. Did you see the wound on that occasion?

A. Yes.

Q. Shortly thereafter you went to the hospital where they performed this operation?

A. Yes. Dr. Cherry can explain that better than I.

Q. In other words, were you under an anesthetic at that time? A. Yes.

Q. In your testimony you jumped rather hastily from that point until the January operation. Can you fill in the details in the meantime, between the time you had this "pressure operation" as you call it, from that time until January?

A. I was back at the hospital for—I think it was over a week. I think my counsel has got the date when I went back to the hospital for a cast change

(Testimony of Amos R. Morin.)

and, if you will consult them, you will see that I was under the immediate care of Dr. Cherry at all times.

Q. From August until the present time——

A. Until the present date?

Q. That is what I am talking about.

A. Until the present date, yes.

Q. You were under Dr. Cherry's care at all times? A. At all times. [195]

Q. You also went, did you not, to the Public Health Service in this building? A. Yes.

Q. During that period? A. Yes.

Q. They took X-rays of you and followed your condition and treated you?

A. They took a cast off, yes. I am a poor man. I couldn't afford——

Q. I just wanted to know what happened. You made many calls, down in this building, at the Public Health Service?

A. Yes. I also asked Dr. Morrison why they sent me up to Seattle, and he said they didn't have no money to keep me here.

Mr. Harr: Your Honor, I object to that and move that it be stricken.

The Court: It may stand.

Q. (By Mr. Harr): You had some treatment during this time for ulcers?

A. Oh, that has been quite a few years ago. You can find the exact date in the records.

Q. You had a gastric ulcer a couple of years before this accident; that is true, isn't it?

A. Yes.

(Testimony of Amos R. Morin.)

Q. Didn't you have some treatment while in St. Vincent's [196] Hospital? You went up there. Didn't they also give you treatment for ulcers?

A. I might have had heartburn one night or so, but I had no treatment. I might have had heartburn or something like that.

Q. Didn't you have trouble with your sinuses?

A. Once in a while.

Q. Had medication for that?

A. In the wintertime my sinuses bother me once in a while, when I catch cold and it settles in my head.

Q. There is drainage from your sinuses?

A. That is when it hurts, when it don't drain.

Q. But you do have trouble in the wintertime?

A. Not usually; only when I get colds.

Q. During this time you were coming to the Public Health Service, after you came back to Portland, after Dr. Cherry manipulated your leg and put a cast on, then you asked for a ticket to go back to work?

A. I had a ticket, yes.

Q. Yes. That was with Dr. Cherry's approval, wasn't it?

A. He thought if I could stand it, it wouldn't hurt me any more. My leg was in a cast.

Q. Then you did go back to work. What date was that, the first day you went back on the job?

A. January 8, 1952. [197]

Q. As a matter of fact, you went back on December 8, 1952?

A. That is when I said.

Q. December 8, 1952?

A. That is right.

(Testimony of Amos R. Morin.)

Q. Then you worked from December 8, 1952, until December 20, 1952? A. January 23rd.

Q. The 23rd of January? A. Yes.

Q. Where did you work?

A. I was a watchman at the moorings on St. Helens Road.

Q. Didn't you go down onto the dredge first?

A. Not at first, no.

Q. Are you sure?

A. Maybe I did, sir. Maybe I did. Maybe that was the time I went down there. I still had my cast on. They gave me a job on the steam donkey, on the elbow donkey on the river.

Q. Isn't it a fact that you worked on the dredge and did your regular duties?

A. No, that wasn't my regular duties.

Q. Are you sure about that? A. Yes.

Q. December 8, 1952, until December 20th?

A. Yes. [198]

Q. Then, is it not a fact you took a job as guard at the moorage on December 21st, and continued to do that until January 23rd?

A. No, I took a job of watching, if my memory serves me right, and if I can read these figures right, February 24, 1953, to April 26, 1953.

Q. Regardless of where it was——

A. Yes.

Q. ——you worked from December 8, 1952, to January 23, 1953, then? A. Yes.

Q. That was all in one stretch, wasn't it?

(Testimony of Amos R. Morin.)

A. Yes.

Q. During all that time were you on the dredge?

A. Five days a week.

Q. The time you worked you were on the dredge——

A. Yes.

Q. ——during that period? A. Yes.

Q. You say you were on what?

A. I was on what they call the elbow donkey. It is the place where that pipe comes out from the dredge and then makes a curve to head to the beach. They was kind enough to give me work.

Q. Is that Mr. Oja who gave you that job? [199]

A. Yes.

Q. Did he assign you to that?

A. Yes. Mr. Sandwick gave me this job in the yard as a watchman.

Mr. Harr: I think that is all, your Honor.

Mr. John D. Ryan: We have no further questions.

(Witness excused.) [200]

DR. HOWARD L. CHERRY

produced as a witness on behalf of Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. John D. Ryan:

Q. You are Dr. Howard L. Cherry?

A. Yes.

Q. Are you a medical doctor? A. Yes.

(Testimony of Dr. Howard L. Cherry.)

Q. Do you practice here in the City of Portland?

A. Yes.

Q. Where do you practice? Where are your offices?

A. Our offices are in the Standard Insurance Building, Ninth and Washington.

Q. What are the names of your associates in your field?

A. The firm name is Drs. Blair, Thatcher, Davis and Cherry.

Q. Doctor, would you give us a statement of your professional training?

A. I graduated from Oregon State College in 1938—

The Court: Let's all concede he is one of the leading orthopedists in the city. I have heard him many times. Is that agreeable to you?

Mr. Harr: Yes.

Q. (By Mr. John D. Ryan): Did you treat the plaintiff in this case, Amos Morin? [201]

A. Yes, I did.

Q. When did you first see him?

A. Going by the record—

Mr. John D. Ryan: Would you hand Dr. Cherry Exhibit No. 6, please. Your Honor, Exhibit No. 6 consists of the records of Providence Hospital.

Mr. Harr: This record was produced pursuant to a subpoena.

Mr. John D. Ryan: They are in a white folder.

The Court: What date was that?

Mr. John D. Ryan: I can't give you the date.

(Testimony of Dr. Howard L. Cherry.)

The Court: About how long ago?

Mr. John D. Ryan: These particular exhibits were in the Clerk's office with the exception of this one, by agreement of counsel. It does not seem to be here. The only other place it could be would be in the Clerk's office.

The Court: The Clerk's office is a big institution.

Mr. John D. Ryan: They were in the vault in the Clerk's office.

(Intermission.)

The Witness: I think I can answer your questions anyway.

The Court: See what you can do without it. The Clerk has gone to see if he can find it. [202]

Mr. John D. Ryan: You may answer that question, then.

A. I can answer that question. I saw him first apparently on August 24, 1952, at Providence Hospital in consultation with Dr. John Thorup.

Q. Did you at that time make an examination of Mr. Morin? A. Yes.

Q. What were your findings?

A. My recollection is that he had a cast which was removed and his wound examined. Dr. Thorup brought with him the X-ray that he had taken, and the history of the bone fracture having been operated previously at Seattle.

The wound at the time I saw him was on the left tibia. It had a slight amount of drainage. The skin around this wound was in very poor shape; circula-

(Testimony of Dr. Howard L. Cherry.)

tion was poor, and it was discolored and the skin was shiny.

The bone itself was angulated. X-rays showed the fracture was not yet solid.

Q. Could you tell us what you mean by angulation?

A. In setting a fracture we attempt to get the two fragments, the upper fragment and the lower fragment, in a straight line, as the tibia normally is.

Q. What did you then do to Mr. Morin?

A. It was my opinion that this should be straightened. When such fractures are not solid yet, it could be done easily, not requiring any further breaking of the bone, so he was [203] given an anesthetic and the fracture straightened without opening the skin or anything, just with my hands we straightened the leg at the fracture site and my recollection is that we cast it. Then we straightened it up a little more after we had it in the cast. Then he was kept in the cast and observed and the cast changed at appropriate intervals until his bone became completely solid.

Q. Was Mr. Morin in a cast when you saw him at your initial examination?

A. My recollection is that he was.

Q. It was at the hospital where the examination took place? A. Yes.

Q. This operation you speak of took place soon thereafter, the next day?

A. I don't recall the date. I could tell you if I had the hospital record here. It was very soon there-

(Testimony of Dr. Howard L. Cherry.)

after, but whether it was the next day or in two or three days, I don't know, something of that nature.

Mr. John D. Ryan: Your Honor, we have the Providence Hospital records, Exhibit No. 6.

The Court: Go ahead.

Q. (By Mr. John D. Ryan): This operation was done immediately after or soon after the examination?

A. I don't like to use the term "operation." "Operation" to us implies a cutting procedure. This manipulation, as I [204] call it, was on the 25th of August.

Q. Was there infection present in the wound at the time you saw him on August 24th?

A. I don't know what is coming up out of this, but I think the term "infection" should be defined a little bit.

There was drainage present; there was a crusting on the wound; the skin was discolored and warmer than normal; its appearance was not normal. It looked critical, that the entire thing might break down.

In answer to your question, the answer is yes, there was infection present. It was not enough at that particular time to make him sick, but it was very unhealthy tissue and there was some infection present, and there was enough that we were much concerned about it.

Q. You remarked that the skin around this wound site was shiny. A. Yes.

(Testimony of Dr. Howard L. Cherry.)

Q. Give us the significance of that.

A. All these things, the purple appearance, the shiny skin, and being warm, indicates that it is not good, healthy skin. This skin, of course, is directly over the bone. It just had the appearance that it probably would not hold up.

Q. After the reduction, the plaintiff stayed in the hospital for some time?

A. This time he was there from August 24th to August 28th. [205] He was in the hospital four days.

Q. After that, Doctor, did you give him any further treatment, after removal of the cast?

A. I saw him at regular intervals, checking by X-rays and changing the cast as needed until the fracture was solid.

Q. On these occasions, had you reason to observe the wound site, Doctor?

A. Yes, I observed it. The wound site actually gradually got worse, until we had to rehospitalize him for further treatment.

Q. When was that further treatment given? What was that further treatment and when was it given? I believe the record shows you had him in there on January 24th.

Q. He was readmitted to Providence Hospital on January 24, 1953. We had been successful in uniting the fractured bones until they became solid, where he had a good bony union.

• However, the skin and soft tissue, the condition of the skin and soft tissue had become much worse.

(Testimony of Dr. Howard L. Cherry.)

As I recall, it was draining at the time he came in. Ordinarily, if it was there at first we would have operated and taken the plate out because the plate and screws consist of foreign materials and tend to keep this going.

However, we did not do it earlier because, if we had, we would have found less fixation of the fracture site and it would not go on to heal. The reason for that time lag [206] is that the fracture should heal and become solid so we could safely take the plate out, without losing the healing of the fracture.

Q. After removal of the Egger's plate, did you continue to see Mr. Morin?

A. I might mention a little more about it, about this drainage. When we removed the plate, the infection was going down into the bone, and it involved the bone. We took this plate out and then I continued to see Mr. Morin, yes.

Q. You say the infection then was going down to the bone?

A. Yes, there was bone involvement at that time.

Q. As to the wound site, was there any healing over the site?

A. Then the wound site became progressively worse, where it did not have an adequate blood supply to heal this wound.

Q. What was your subsequent treatment of Mr. Morin?

A. We watched him, hoping that we could get this thing healed without having further hospitalization, but it became rather obvious that he would

(Testimony of Dr. Howard L. Cherry.)

have to have a skin graft to replace these defects in the skin, and, because of economic reasons, it is my recollection that I advised that he should have this done at the Veterans Hospital, so he was then admitted to the Veterans Hospital for the first time, and the doctors there took over primary care.

Q. Did you continue to see the plaintiff? [207]

A. I continued to see the patient, not at frequent intervals but at considerable periods, for two reasons: One, I was, myself, interested in this rather critical leg and, the other, that I am not employed by the Veterans Hospital, but I was trained there and I had a teaching residency there, and I keep in pretty good touch with the residents and the doctors at the hospital; so I did keep up to a fair degree in what was going on in his case. I was not responsible in any manner at that time.

Q. Was your associate, Dr. Davis, treating the case?

A. Dr. Davis is a consultant and is in on most of the surgery in orthopedics at the Veterans Hospital, and supervises all work that is done there. He is up there about four days a week for some length of time.

Q. When did you last see the plaintiff?

A. I last saw Mr. Morin in my office on July 14, 1954.

Q. Will you explain some of these terms to us? What is the significance of drainage which, by your testimony, you found existing when you first examined the patient on August 24, 1952?

(Testimony of Dr. Howard L. Cherry.)

A. Drainage is due to bacteria, to a bacterial infection, which is present in the wound, essentially pus.

Q. Was there any granulation tissue present at that time, at the time you examined him?

A. I would say there was a small amount of granulation [208] tissue around the edge; it wasn't large——

Q. What is granulation tissue?

A. Tissue that is set up in a wound in an effort to repair, Nature's effort to repair the wound. It gradually changes over into scar tissue and closes the wound over in a normal repair process, in which there is exposed tissue.

Q. Had you reason to observe the condition of the circulation in the left lower leg? A. Yes.

Q. This was on August 24th? A. Yes.

Q. Describe to us what you did with regard to the circulation, what you observed, and so on.

A. The general circulation of the leg was very satisfactory, though the local circulation around the wound was very poor. The skin was dry, and it was critical locally in the region of the wound.

Q. Tell us what you mean by "critical locally in the region of the wound."

A. Locally; that means in the immediate proximity, within an inch or so of the wound. "Critical"—we use that term in relation to whether the circulation and the tissue is good enough to heal that wound. It could go either way. It could not heal or could heal. If it were good tissue, if he had good

(Testimony of Dr. Howard L. Cherry.)

skin, good soft tissue around that wound and [209] not a large amount of drainage, it would go right ahead and heal.

We were scared, for it was critical and we thought it might not go ahead and heal, which it subsequently did not do. The term "critical" has nothing to do with the patient's general condition; that is, of life and death.

Q. You are particularly referring just to its ability to heal? A. Yes.

Q. At the time you saw him, had the patient given you a general history of his treatment?

A. Yes, in a general way.

Q. Had he informed you he had been treated initially at Physicians and Surgeons Hospital?

A. Yes.

Q. Can you tell us what he told you about his treatment?

A. Well, he told me he had been sent by Dr. Done and he was treated there. I asked him if he had been operated and given an anesthetic and he told me he had not.

I asked him how long he was there and it is my recollection that he told me he was transferred on the third hospital day. It would be two days or the end of the third day when he was transferred—I am not sure of the hours.

I asked him what they did for him and he said that [210] the doctors did not give him any anesthetic, did not operate on him, but put him to bed. Obviously, a layman cannot give accurate details of

(Testimony of Dr. Howard L. Cherry.)

the care received, but they do know whether they are given anesthetic and things like that.

Mr. Harr: This is the history that Mr. Morin——

The Witness: This is what Mr. Morin related, yes. I was not involved in it, no, of course.

Q. (By Mr. John D. Ryan): You have been handed Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2, A and B, Doctor, the X-rays from Physicians and Surgeons Hospital. I believe you have the clinical record of the Physicians and Surgeons Hospital there. This is Plaintiff's Exhibit No. 1. A. Yes.

Q. Are you familiar with that exhibit? Have you seen it?

A. I have seen this before, or a photostatic copy of it.

Q. And you have examined it in detail?

A. Yes.

Q. You have in your hand Exhibits 2-A and 2-B, which are X-rays taken of the plaintiff at the Physicians and Surgeons Hospital, June 10, 1952. Tell us what you read from those X-rays.

Q. Is this the only X-ray on this date? This——

A. This contains only one view. Usually they are taken in two views.

Q. There are two X-rays. [211]

A. There is an X-ray of his back, one picture of his back; there is one picture of his leg, one view.

Q. Those are the only ones we have been given. We subpoenaed those.

A. In order to make a complete examination of

(Testimony of Dr. Howard L. Cherry.)

a leg, by X-ray, it should be taken in two views, but let's forget about that. This shows the fracture very adequately.

Mr. John D. Ryan: Here is Exhibit 2-C which I will presently hand to the witness, and Exhibits 2-D, 2-E, 2-F and 2-H.

(X-rays handed to the witness.)

Q. You have not had an opportunity to see those before? A. I have not seen these before.

Q. They were not available when we looked at the other records?

Mr. Harr: I do not believe that is correct. I think they were in the Clerk's office.

(Intermission.)

Q. (By Mr. John D. Ryan): Have you had an opportunity to look at those? A. Yes.

Q. Would you give us their significance, as far as reading them is concerned?

A. These are films dated June 10, 1952. They have the [212] name of Amos Morin and the name Dr. Lee A. Craig, and Physicians and Surgeons Hospital.

Q. As you read each film, would you give us the exhibit number of it?

A. The exhibits are 2-A and 2-B. 2-A is one of an AP view of the tibia and fibula. That is taken with the tube in front and the film behind.

2-B is a lateral view of the tibia and fibula; it is not quite full length. It does not show the angle.

(Testimony of Dr. Howard L. Cherry.)

These two films show a fracture of the tibia and fibula. The tibia is the large bone and the fibula is the small bone.

There are three separate fractures here. There is a fracture of the tibia at about the junction of the middle and lower third; a fracture of the fibula approximately one inch further toward the ankle from the tibia fracture, and a second fracture of the fibula right here (indicating). This is the fracture of the tibia (indicating).

In considering these fractures, we are interested almost entirely in the tibia. We are not particularly concerned about the fibula.

This shows a complete irregular fracture that is completely offset; that is, the bone is completely in two and the offset is a little more than the width of the [213] bone.

On the other view, the smaller fragment is posterior and offset approximately half the bone.

Another point of interest here is that in looking at the soft tissue we can follow this line of soft tissue, the muscle, fat and skin, and in this X-ray it appears that the fragment is outside of the skin. Not always can we tell it by X-ray, but in this film we can safely say that this is a compound fracture, so our diagnosis would be a fracture of the fibula and tibia, compound, with a severe displacement.

Q. Look at the other X-rays and tell us what they show.

A. Again I would like to mention that I have not seen these films before and sometimes films are best

(Testimony of Dr. Howard L. Cherry.)

studied for a length of time, but I can look at them quickly and give you my impression.

This one is No. 2-B. On the back of the film it states it was taken on 6/10/12—I mean 6/10/52—of the patient Morin.

This is a lateral view of the lumbar spine, down to the pelvis. The film is taken with the X-ray machine showing across the body.

This shows a compression fracture of a vertebra between the—I can't tell for sure which vertebra it is from this film. It looks like either the first [214] or the second lumbar vertebra. It is a real fracture and it is acute, and I would classify it as mild, moderate in deformity.

This is an AP film of the pelvis and the lower part of the lumbar spine, and taken with the tube in front and the film behind in this lower region.

It shows the sacrum and the sacroiliac joint and lower vertebrae, but I see no evidence of fracture in any area covered by this film.

This is an X-ray—this is Exhibit 2-G, taken on 6-10, and Mr. Morin's name is on the film.

It is taken AP, with the film in front—excuse me—with the tube in front and the film behind.

It has the same projection as the last film except it is higher. This shows the lumbar vertebrae and the first dorsal vertebra, the dorsal vertebrae being the ones to which the ribs are attached.

This shows a fracture of—I would call it the second dorsal—the second lumbar on this film. I cannot, again, be completely sure, but it does show the

(Testimony of Dr. Howard L. Cherry.)

fracture, but it is not seen as well as on the lateral view film.

Exhibit 2-F is taken the same date; has Mr. Morin's name on it. This is what we call a condyle-film; it is taken laterally, the same as the one before. It is taken to show greater detail, and it again shows a fracture of a lumbar vertebra. [215]

This is Exhibit 2-H, dated 6/10, and it again has Mr. Morin's name on it. This is a lateral view, taken low down. I do not see any evidence of recent injury in this film.

Q. Will you take Plaintiff's Exhibit No. 1, which is the record of treatment at the Physicians and Surgeons Hospital? A. Yes.

Q. Would you turn to the third page in that record where there is a description of the diagnosis entered there.

A. The diagnosis is on the second page, I think.

Q. Have you got the admission and discharge record? A. This is the second page.

Q. Would you be kind enough to read the diagnosis as written there and then say whether that corresponds with your findings as to the reading of the X-rays which you have now made?

A. I have the final diagnosis, Exhibit 1. It reads: "Fracture, oblique, left tibia, junction of lower and middle thirds; fracture, oblique, left fibula——"

That is correct, except there is one glaring omission. They don't say whether this is a simple fracture or a compound fracture, but the description is

(Testimony of Dr. Howard L. Cherry.)

otherwise correct of that fracture, except it should say "compound."

Q. Does the remaining portion of that description correspond with your reading of the [216] X-rays?

A. "Fracture, oblique, left fibula; fracture, left fibula, proximal portion, not displaced; compression fracture of the 1st lumbar vertebra."

That diagnosis is entirely correct except it would have been better to have said whether it was compound or simple.

Q. You were familiar, from your history taken of Mr. Morin, with the manner in which he was injured?

A. Yes.

Q. Would you tell us what that was?

A. As I recall, he fell from a ladder.

Q. Yes, on June 10, 1952, it has been established, sometime between noon and 12:30. Would you be kind enough to turn to the laboratory record?

A. Yes.

Q. Would you read that laboratory record, which was read previously, and tell us if it has any significance, any clinical significance, at this time?

A. This has no significance.

Q. At this time?

A. This is dated 6/10. The urine is a little concentrated, but it is not too bad.

Q. There is an X-ray record entitled, "Lumbar Spine, Pelvis and Left Leg," signed by Dr. Isenhardt.

Would you read that and tell us whether [217]

(Testimony of Dr. Howard L. Cherry.)

that corresponds with your findings as to the X-rays?

A. I believe that is entirely correct; all the statements are correct there. He does not mention whether that had the appearance of being compound or simple, but his description of the fracture is very accurate.

I might say that usually a radiologist does not say whether a fracture is compound or simple, because it is so easy to tell otherwise. I would not criticize the reading, and, also, the X-ray evidence is not as conclusive as an examination of the wound, so there is no criticism of the reading. I think the reading is very accurate.

Q. Would you turn to the temperature chart?

A. Yes.

Q. First, turn to the doctor's order sheet.

A. Yes.

Q. You examined this before trial?

A. Yes.

Q. The doctor's sheet, 6/10/52, Physicians and Surgeons Hospital. It indicates some medication was given at 1:45 p.m. What is the medical significance of that type of medication?

A. Penicillin, S.R., 400,000 units, et cetera. This is a rather large dose of penicillin given twice a day. The purpose ordinarily would be either to prevent the establishment of bacterial infection or to treat it, and it is well [218] indicated in this case.

Q. Will you comment on the subsequent notations?

(Testimony of Dr. Howard L. Cherry.)

A. Next, it says "M.S.," which is morphine sulphate, given every four hours for pain. That, again, is administered for the pain that would have been associated with this fracture.

The next is "C.B.C.," which means a complete blood count which had been done, type and cross-matching, which means to find a compatible blood to be given for blood transfusions when ordered. It simply means to cross-match it and see that it is ready if needed.

Q. Why would a blood transfusion be needed?

A. Why wouldn't it?

Q. Why would it?

A. This man had sustained severe injuries. At the time he came in he was examined apparently, and the possibility of him going into shock was considered, and blood was ordered in case he did, and in case he needed it. Those are standard, excellent practices.

Q. You have examined this record previously?

A. Yes.

Q. Did you find in that record that blood transfusions were ever made?

A. I did not find that it was ever made. I did not find that there was any reason whether it should have been given. [219]

Q. Is the morphine sedation for pain?

A. Yes.

Q. There is another indicated, sedamyl.

A. Sedamyl is a proprietary drug. It does not

(Testimony of Dr. Howard L. Cherry.)

happen to be one I have used or am familiar with, but I believe it is a sedative.

Q. Would it indicate that would be for pain, also? A. Yes, for pain.

Q. Deprapanex, 4 cc.

A. Deprapanex is extracted from the pancreas and it is given for the purpose of keeping the blood vessels working, increasing the circulation. It is a rather general drug. It doesn't do any harm and maybe it will help sometimes.

Q. What would be the specific reason for the use of Deprapanex?

A. My thought is that the thought going through this doctor's mind was that he wanted to keep the circulation as good as possible in this leg.

Q. That would be on account of a circulatory condition existing in the bone fracture, the site of the fracture?

A. The circulation condition in this area, which is critical anyway, a critical area, and anything you can do to help the circulation certainly would be worth doing.

Q. What do you mean by a "critical area"?

A. It is quite a subject, quite complex. When we see [220] fractures over the body, we know from past experience that some of them will heal no matter what you do, almost, and with others you have to be meticulously careful in order to get them to heal.

One of the places that we regard with the greatest care is the junction of the middle and lower surfaces

(Testimony of Dr. Howard L. Cherry.)

of the tibia, because of the circulatory problem involved. The circulation in the upper or around the upper tibia is excellent and the circulation surrounding the lower tibia at the ankle joint is very adequate.

The circulation into this one particular area of the tibia has to come quite a ways, and is supplied with relatively small and few blood vessels. Therefore, we should take special precautions to preserve the circulation in that particular area.

Q. If you will return to the doctor's order sheet, 6/10/52, there is a notation, "Light diet" and "Fluids."

(At 12:40 p.m., a recess until 2:00 p.m., was taken.) [221]

(Court reconvened at 2:00 o'clock p.m., July 22, 1954, pursuant to recess, and further proceedings herein were had as follows:)

Direct Examination

By Mr. John D. Ryan:

Q. Doctor, I believe I was asking you to look at the doctor's order sheet of the Physicians and Surgeons Hospital when we recessed, the order sheet as to 6/10/52. On it is indicated "Light diet," and then "Fluids ad lib," and then "Return flow," and so on.

Will you indicate to us the significance of that medication?

(Testimony of Dr. Howard L. Cherry.)

A. Light diet is food that is easily digested and that he would be able to take. "Fluids ad lib" means he should have such fluids as needed.

Q. What is meant by "Return flow p.r.n."?

A. That is an enema that is given to prevent the belly from becoming distended, or to help if it does become distended.

Q. There is additional medication indicated on June 10, 1952. Is there any essential change in medication there?

A. There is a change in the type of penicillin, from one brand to another but, essentially, it is the same thing, and is the same dosage.

They have increased his sedation a little bit, [222] but nothing remarkable about that order.

Q. I notice on 6/10 there is an indication of "Catherize p.r.n., 8 to 10 hours." Will you read that?

A. "Catherize p. r. n., 8 to 10 hours." That means that if he was unable to urinate, there was a standing order for that.

Q. Does that indicate that it was done?

A. This order does not indicate that it was done. It is merely an order to the staff, that if it was necessary that they could do it.

Q. Would you be kind enough to look at the part of the doctor's order sheet and inform us whether there has been any essential change in medication or treatment of the case down through June 11th?

A. On June 11th, they stopped the rather heavy

(Testimony of Dr. Howard L. Cherry.)

sedation for pain. They gave him some fluids. That is essentially all.

Q. What would be the significance of giving him fluids?

A. Well, that is a rather small amount of fluid, actually. Usually a patient requires about 3,000 cc. of fluids a day. This ordered 1,000. From the order I would assume he was taking some, but he needed to supplement it because he wasn't taking enough.

Q. Is there any significance about the change in sedation?

A. The assumption on my part is that he was becoming rather [223] heavily sedated, and they didn't want to keep him——

Q. I notice on the bottom of the sheet, June 11th, there is some entry to this effect: "Omit sedamyl, while markedly sedated." Will you explain what that means?

A. It says "Omit sedamyl while markedly sedated." Sedamyl is a sedative and apparently from this order he was quite far sedated, and they wanted him to quit, so they left it out.

Q. Is any of this treatment related to the condition of shock?

A. The only thing here I can see that is related to shock would be to type and cross-match the blood. It was not used. I don't think shock was ever treated as such, by these orders.

Q. If you will turn to the next page, Doctor, 6/12/52, 7:45, would you give us the significance of the entry there?

(Testimony of Dr. Howard L. Cherry.)

A. The order reads: "Give Dromoran, 1 cc. by hypo now," which was 7:45 in the morning, and "Allow patient to take four Empirin No. 3 tablets along."

Apparently that was when they were getting the ambulance, but that is rather light sedation; that isn't very much.

Q. Is there any entry indicating a continuation of the fluids?

A. No, there are no fluids ordered that day. [224]

Q. Would you turn to the temperature chart in the same exhibit, Exhibit No. 1, for the morning of June 10th? Would you explain the significance of that?

A. Well, there are two graph markings here—three. The top one on the original is red; it does not show in the photostat. That is his pulse. The normal pulse is around 80, something like that. The rate of pulse rose to about 110.

The next line has "R" written on it, and that is his temperature. The temperature was practically above 100 the last times it was taken.

Then, at the lower portion of the chart is "Respiration," and the respiration rose to 24.

Q. I notice you say the upper line indicates the pulse rate? A. Yes.

Q. Tell us what that means as to the times at which the various pulse rates are recorded?

A. At the time he came in, his pulse was 86; at the time of the first reading, at the time it was first

(Testimony of Dr. Howard L. Cherry.)

measured—that would be at 6:00 o'clock in the afternoon of June 10th—his pulse recorded 86.

Q. Before you proceed, will you tell us what a normal pulse is?

A. A normal pulse runs in the range of 70 to 80. [225]

Q. Yes.

A. And this is about 86, which was not a significant rise. Then it goes up to 110, which is more rapid than normal. It is not dangerous, but it is a significant rise.

Q. What is the significance of that rise, related to what?

A. That means he is sick; that is all it means. If it were extremely high, it could mean he had bled out or something like that, but that is not remarkably high; it is about what you would expect for that kind of injury; nothing unusual about it.

Q. You were then going to remark on the temperature.

A. The temperature was 99 when he came in and it goes up to 100. Again, that is approximate. There is a little rise in temperature there which you would expect to have occur after an injury. It does not mean his condition is critical or that he has septicemia or anything of that nature troubling him. It is a fairly normal rise in this type of injury.

Q. Would the pulse rate have any indication as to the condition of shock?

A. In the presence of shock, severe shock, the pulse rate would be very rapid, but the most signi-

(Testimony of Dr. Howard L. Cherry.)

ficant time is early. It was not very high and never did go high enough to be particularly significant.

Q. Would you explain to us the significance of temperature [226] as to the question of shock?

A. It has no relationship whatsoever, as far as I am concerned.

Q. I notice, also, the red line runs from the word "urine." Can you explain that, at the bottom of the page?

A. There is nothing in the urine—that red line does not indicate the urine at all. However, the blood pressure is recorded there as being 140 over 88, which essentially rules out any shock being present. That is a normal blood pressure.

Q. With reference to the question of blood pressure, would you explain that?

A. Well, first of all, in shock the most indicative of anything we can measure is blood pressure.

Q. Would you explain why a blood pressure is indicative of shock?

A. Shock is quite a complicated picture, but essentially it is a collapse of the circulation, and the thing that happens is that the blood vessels relax and, instead of the heart pumping blood into these blood vessels, these vessels relax and the pressure goes way down, and the heart beats rapidly, trying to maintain the pressure; but in lay terms I think "collapse" is about as good a term as we can compare "shock" to. It is quite intricate, but the essential factor in it is marked reduction of blood pressure so that the [227] circulation is not maintained normally.

(Testimony of Dr. Howard L. Cherry.)

Q. Blood pressure would go down, then, in the presence of shock? A. Yes.

Q. Would you look at the bedside notes in the same exhibit and would you read to us the blood pressures that were taken and the times at which they were taken, as recorded in the bedside notes of the record of the Physicians and Surgeons Hospital?

A. June 10th, the first blood pressure I see noted is taken by a nurse on the floor, presumably at 3:00 o'clock. His blood pressure is recorded as 140 over 88.

Q. That would be the one you have just explained?

A. I think another point that might be of some interest is that apparently nobody was interested enough in or was sufficiently afraid of shock to order the blood pressure taken. If you are afraid a patient is going into shock, you order the blood pressure taken every half-hour. It was not in the order sheet and they didn't take it until 6/11/52 at 4:45; that is the next one I see here, so apparently nobody was much concerned or was much afraid he was going to be in shock.

The next blood pressure is 4:45 p.m., on June 11, 1952, and that again is a normal blood pressure, 130 over 90.

Then, at 8:00 o'clock on the evening of June 11th [228] it is 140 over 90, and that is all the blood pressure recorded.

Q. Is there any significant change in any of these

(Testimony of Dr. Howard L. Cherry.)

blood pressures indicative of shock? A. No.

Q. Returning to the bedside notes, Doctor, that you have read previously, is there any significant information in the bedside notes that would vary your interpretation of the medication given in the doctor's order sheet?

A. As far as medication goes, the nurses have carried out very correctly the medication ordered by the doctors, and that is recorded, if I understand that is what you mean.

Q. Yes. Beginning under the word "Remarks" it reads: "Admitted to 115 per stretcher," on the first page of the bedside notes. A. Yes.

Q. Could you read that for us?

A. "Admitted to 115 per stretcher, X-ray. Put to bed in hyperextension."

Hyperexten means with the back extended in this manner (illustrating). The reason for that is to protect the fracture of the spine.

Q. How does that protect it?

A. It keeps pressure off the compression fracture of the spine. [229]

Q. That is by arching? A. That is right.

Q. Going on down under "Remarks," can you read the next entry?

A. Yes. "Drs. Schneider and Stalder here"—that is at 3:00 p.m., June 10th. Then the nurse signs her name "E. R. Mueller, R.N." That is the last note written on the date of admission.

Then on 6/11 we find "Left leg elevated on two

(Testimony of Dr. Howard L. Cherry.)

pillows," and a notation of medication for pain.

Then at 5:30——

Q. I notice the date is June 10th?

A. This is June 11th now.

Q. This is June 11th?

A. June 11th starts about the eighth line down under Mueller's notes.

Q. To the left there is the date June 10th, and then the hours as they are going down. Are you talking about 4:15?

A. I may be reading this wrong, but this looks like "3/11." Maybe that is something else. Yes, it is. I don't know what these marks do mean. It looks to me like "3" and then a dash and then "11." On the eighth line it reads: "Left leg elevated on two pillows."

Q. Explain the significance of that elevation?

A. The leg is elevated to keep it from swelling and to [230] keep it from bleeding. That is standard. That is all.

Q. Elevated on pillows? A. Yes.

Q. Going down further into "Remarks," you see "Dromaron for pain." A. Yes.

Q. Would you explain what Dromaron is?

A. Dromaron is a sedative, an analgesic.

Q. At 5:00 o'clock on the afternoon of the 11th I notice he is sleeping. A. Yes.

Q. Is there any further significance noted under "Remarks"?

A. This patient had been very well watched by the nurses, I might say. They have a note there for

(Testimony of Dr. Howard L. Cherry.)

every 15 minutes to a half-hour. I see here "Crying, in pain" at 5:30; at 5:45, some more Dromaron. That is an hour and a half later. At the same time he refused any diet. At 6:30 he was sleeping, and at 7:00 he was awakened by the family. He apparently had visitors. At 7:30 he was having some pain and at 8:00 o'clock he had some tea. At 9:00 o'clock he had penicillin and Deprapanex.

Q. Explain the significance of the penicillin and the number of units given.

A. That is a good, substantial dose of penicillin, 400,000 units. It is given twice a day. That is a standard dose. [231]

Q. Deprapanex, you have explained that previously.

A. I explained that before. It is given for the purpose of improving the circulation.

Q. I notice here a notation "Some bleeding from left leg" on the last page of the sheet for June 10th. What is the significance of that?

A. It depends on what is around this leg. You would expect in a wound that has not been closed that the wound would bleed, and the amount of bleeding is dependent on what it is bleeding through. If it is a thin dressing, a small amount of blood might bleed through; but if it is a thick dressing, it takes more. Just from that note I can't tell how much bleeding was involved.

Q. If you will refer to the next page of the bedside notes, the first note there says "Has no desire to void." Is that of any particular significance?

(Testimony of Dr. Howard L. Cherry.)

A. He has been in the hospital since 3:00 o'clock and it is now 9:00 o'clock. There is no great significance to it. It just means he does not have to empty his bladder. He has not taken enough fluid to distend it. I would not attach anything very profound to it.

Q. As you go down under "Remarks," please explain the significance of any further remarks.

A. At 10:00 o'clock he is asleep. At 10:20 he was given some Dromaron again for pain in the back. [232]

At 10:30 he was catheterized and voided 300 cc. by catheter; nothing wrong with it. That is about a little over a cup; wouldn't be much distended if that is all he got.

Q. Have you found any significant evidence of ileus up to this point in the bedside notes of the doctor's orders?

A. I have not yet. I might make a remark there.

Q. Yes, if you will.

A. That nurse wrote beautiful notes, and the doctors wrote almost nothing. Ileus is something that the doctors would notice, and that notice would not appear from the chart. I can't say one way or the other.

Q. Would you anticipate its presence at this stage?

A. I would expect an ileus in a fractured back to occur usually in about 24 hours.

(Testimony of Dr. Howard L. Cherry.)

Q. In a fractured back of the type you have seen in the X-rays here?

A. Yes, that is the common thing.

Q. Would you go further down under "Remarks" then, Doctor?

A. Then, at 12:00 o'clock midnight there is a note, "Seems to be sleeping quiet."

At 3:40 he was given Dromaron for pain.

Then, at 6:00 o'clock in the morning, when patients are awakened in a hospital for some reason, the nurse states that he was given his early morning care which [233] consists of washing the face and hands, and letting them wash their teeth or something like that.

Q. At this point, at 6:00 o'clock on the morning of the 11th, is there any evidence of shock in the information given by these notes?

A. There is nothing in the information in the chart; there is nothing either way. He is alert or awake, and there is no blood pressure taken. His pulse is within reason, but I can't say Yes or No from the evidence exhibited in his chart.

Q. Would you go through the "Remarks" and the directions given down through June 11th?

A. Then, after 6:00 o'clock, the notes state that he had a light diet and ate fair, which would indicate—that would indicate that he did not have an ileus. You don't eat when you have an ileus. Apparently he was cooperative at that time and able to eat.

(Testimony of Dr. Howard L. Cherry.)

Then he had Deprapanex again, and then had a bath, and was given penicillin.

The note is "Some bleeding showing through dressing," and "Drs. Stalder and Craig in."

At 9:05 he had another hypo for his pain. At 9:30 he had some more sedatives and the note reads: "No desire to void. Has been perspiring."

Then, at 11:00 o'clock: "Dr. Leonard saw [234] patient."

At 12:00 o'clock the note reads: "Ate very little."

At 1:00 o'clock he was given empirin for pain, and there is a note, "No relief from empirin."

Then at 2:00 o'clock the note reads: "Some bladder distention," and "Unable to void."

Q. Will you explain the significance of that?

A. That means the bladder was full and he had a desire to uninate but couldn't urinate.

Q. How can that be relieved?

A. Sometimes they can do things to help them urinate themselves; sometimes they have to be catheterized.

Q. Go on down through "Remarks," then, please.

A. Then at 3:00 o'clock the patient is sleeping very soundly and perspiring; given a light diet, and the nurse states she is unable to rouse patient. That is at 4:30.

Q. Is that related to his sedation?

A. He has had an awful lot of sedation, I would say.

Q. When you say "an awful lot of sedation,"

(Testimony of Dr. Howard L. Cherry.)

would you explain the significance of that, what you mean by that?

A. Ever since he has been in there he has been getting something for pain or rest every two or three hours.

Q. Has there been any other treatment given to relieve pain evidenced here? [235]

A. There has been Dromaron, Sedamyl, empirin and codeine.

Then the blood pressure is recorded again, as mentioned before, at 130 over 90, and he passed 350 cc. of urine apparently by himself—no, it is catheterized again. 4:45, catheterized, 350 cc. urine. A note is made that there is still some bleeding through the dressing and the urine is dark in color. The significance of dark-colored urine is that it is concentrated and that he probably did not get as much fluids as might have been ideal.

Q. How would fluids be administered to a man in this condition?

A. The nurse can give fluids by mouth, by element of persuasion, up to a certain point. If he is unconscious, they would have to be given intravenously.

Q. What do you mean by intravenously?

A. By tube and needle. You put this in a vein in the arm, usually.

Q. At this time the patient, by the record, seems to be sleeping?

A. He seems to be. The note says the nurse

(Testimony of Dr. Howard L. Cherry.)

could not rouse him. That means just plain sleeping. He is quite sedated, apparently.

Q. You would expect a man with this amount of sedation to be pretty much in a stupor?

A. Yes. [236]

Q. Is there any indication that intravenous fluids were given to the patient?

A. I haven't found it yet. No, there have been no intravenous fluids up to this point.

Q. I notice it says, "Some bleeding through dressing." That has no significance?

A. I don't know whether that is the same bleeding he had before or whether it is a new bleeding. Usually, when you see a note like that you think it is still bleeding. Again, I can't tell you how much. It depends on how thick the dressing is or how tight it was put on.

Q. Further on in the exhibit, if you will look to the out-patient record, I think about the last page——

A. Is it a part of the same chart records?

Q. The last page in the same exhibit under "What Was Done." You see the notation "Compression dressing to left lower leg." Would that have any significance as to the size of the dressing, with relation to the bleeding?

A. Again, I don't know what they call a compression dressing. A compression dressing I put on would be quite thick and it would take an appreciable amount of bleeding to bleed through, but I

(Testimony of Dr. Howard L. Cherry.)

can't tell what they call it. Some people use a little one and others use a big one. I use a big one.

Q. Then there is no uniform size of a compression dressing?

A. That is right. If they want really to immobilize this, [237] they use a big one. I assume that they had a big one, but I don't know.

Q. Going further down through these bedside notes under "Remarks" I notice here, "Side rails on."

A. Those are rails that are put on the sides of the bed to keep the patient from falling out of bed. The significance of that is, it would seem to me, with his sedation they were afraid he was not well enough to control all his actions and that he might get out of bed or fall out of bed or climb out of bed. These are just side rails on the edge of the bed.

Q. I notice the notation "Patient somewhat restless." Would that indicate a reason for the side rails?

A. Yes, that would go with the reason for the side rails.

Q. Is there anything further in those remarks that you feel is of significance that would alter the course of treatment, your impression of the course of treatment which was given?

A. I am not sure what you are asking for in your question, but it does not look like it is a patient that is ideal to go for a long trip.

Q. Why do you say that?

A. Well, he is not conscious a good share of the

(Testimony of Dr. Howard L. Cherry.)

time; he is restless and threshing around. He is not in shock, but his condition does not look like it is very good. They still have to catheterize him to get him to pass his urine. [238]

Q. Would moving the patient have any effect on the condition of the back?

A. A patient could be moved with a fractured spine. If it is done right, I don't think it will do any damage. If he were in a hyperextension position, it could be done. However, it would be rather an intolerable thing for a patient to stand and it would be far more analgesics than we like to give them ordinarily, to try to move a patient with an injured back 200 miles.

Q. By moving the patient, you mean to take him in an ambulance, as this man was, to Seattle?

A. Yes.

Q. What would be the effect of this movement upon the leg?

A. If the leg were perfectly immobilized in a cast, or something like that, he could be moved like that without any effect. However, if it were not well immobilized, it would increase the deformity, and it would impinge on the soft tissues which are already critical, and it certainly would not help.

Q. What do you mean by "perfectly immobilized"?

A. "Perfectly immobilized" to me would mean that the fractures are reduced in good apposition and held with some sort of device, either internally

(Testimony of Dr. Howard L. Cherry.)

with screws or a plate, or externally with a good cast, for a trip like that. [239]

Q. What would you describe an adequate cast to be?

A. A good cast would be some padding around the leg and then to enclose it in plaster, or the equivalent of that, but it should be done so that it does not pinch on the fracture and also so that it holds the fracture, so that it will not move from its reduced position.

There is one other standard and excellent way of immobilization or moving the patient that has been used in war, in practice in connection with the war, particularly, and to a considerable extent in civilian practice, and that is the Thomas or so-called Thomas splint in which the leg is bolted on. That would be a satisfactory method except, again, that would be quite uncomfortable.

Q. Would you say that a compression dressing extending up above the knee and over the injured area, involving the use of a Yucca board splint which would be 24 inches long, would be of sufficient immobilization or would constitute sufficient immobilization to permit the movement of the patient under these conditions?

A. It would be far from ideal. I think, unless there is some emergency, it is not ideal for transporting a patient with this type of fracture.

Q. By being far from ideal, do you mean resultant danger to the patient?

A. The danger in this stage is that of damaging

(Testimony of Dr. Howard L. Cherry.)

the tissues, [240] as well. You must do everything you can to preserve the tissues so that they will heal well, and any moving around or dislodging of the fracture fragments or pressure on the skin or tissues will make the tissues that much worse when it comes to healing.

Q. Would that affect the circulation, Doctor?

A. Yes, it could.

Q. In what manner would the circulation be affected?

A. The circulation is affected by this pressure and movement of the small blood vessels which go into the particular area involved, the blood vessels feeding down to this area where the bone fracture existed. Every bit of tissue in the body has blood vessels in it.

Q. You said that having a Yucca board splint approximately 24 inches as a part of the compression dressing, a fairly heavy compression dressing, would be far from ideal. What do you mean by that? Did you mean that there would be risk?

A. Yes. I do not feel that is adequate for transporting a patient.

Q. Would you turn to the out-patient record in the same exhibit? Have you got that, Doctor?

A. Yes.

Q. It indicates he was brought in by ambulance and his condition diagnosed as a compound fracture of the left lower leg, and it indicates "Consultant: Dr. Craig" and "Attended [241] By" and then it says "Schneider and Stalder." A. Yes.

(Testimony of Dr. Howard L. Cherry.)

Q. Would you read the statement of what was done?

A. "Morphine gr. $\frac{1}{6}$ hypodermically for pain at 1:30 p.m. Compression dressing to left lower leg. Abbocillin, 800,000 units; catheterized, specimen to laboratory," and then the patient was sent to X-ray and it reads: "Admitted to Room 115."

Q. Can you give us the significance of that, or state what treatment was given, from this report.

A. From this report, this fracture was not treated. I mean the report does not say that it was treated. All the report says is that a compression dressing was put on.

Q. Would you say from the thorough reading of the report that you have made, and previously, of what had been done up to this point, and considering his other injuries, that the compound fracture of the lower third of the tibia had been properly treated?

A. I would say no.

Q. Why do you say that, Doctor?

A. Any compound fracture is an immediate emergency, and anybody who ever went through medical school should know it. We spend hours and hours trying to teach everybody that point. This is a compound fracture and it is a severe thing and it involves an area where there is notoriously poor [242] healing, and if any compound fracture is an emergency this would be a great emergency.

The proper treatment, in my opinion—and I believe it is shared now universally—is that this wound

(Testimony of Dr. Howard L. Cherry.)

should be very carefully examined, carefully cleaned, to its depth, reduced if possible and the wound closed. If there is any foreign material anywhere, it should be removed. If there is devitalized tissue anywhere, it should be removed.

The time element is of extreme importance. We figure that what we call the golden time in the treatment of fractures, compound fractures, is from six to eight hours.

If we get a fracture at 3:00 o'clock in the morning, we get out of bed and we come and call the surgeon and anesthetist and X-ray technicians, everybody—it takes about ten people—and that fracture is treated just as soon as we can do it, in order that we can treat this patient properly, because when contamination gets in there, you get danger of infection and of impaired healing, and we figure that the time is from six to eight hours, the earlier the better, but after that length of time the tissue is damaged and cannot heal as well as it could before that.

When it goes 24 hours, ordinarily we would not even close it because there would be danger in closing the wound.

The most striking thing about this whole thing to me [243] is how people practice medicine and don't know that or don't practice it; that is, early, adequate cleaning, reducing and closing and fixation of the compound fracture. You would not expect everybody certainly to be able to do it adequately, but I would expect anybody, a nurse or anybody, if

(Testimony of Dr. Howard L. Cherry.)

they didn't know how to do it, I would expect them to know what should be done, and, if they can do it themselves, why, then, go ahead; if not, get some help.

The criticism I have, after carefully studying this, is that, not that they wouldn't know how to do it but that they did not, for some reason, either do it right then or call someone in who knew how to do it.

Mr. Harr: We object to that type of testimony, your Honor, because the doctor is testifying from what he says shows in the record, and the testimony has been otherwise. If Counsel framed his question around what the record shows, then I think the doctor would be perfectly qualified to answer it.

I am objecting to this entire line of testimony anyway on the ground it is improper and irrelevant.

The Court: He may continue. Proceed.

Q. (By Mr. John D. Ryan): In addition to the information you have gained from a reading of the record in the courtroom and at your office, the testimony shows here that when this man was brought from his home in Portland, Oregon, [244] about 12:00 or 12:30 on the afternoon of June 10th, 1952, he was taken by ambulance to the Physicians and Surgeons Hospital and taken to the emergency room there, and at that time there was a protrusion of the bone through the leg, and there was a compound fracture of the lower third of the left tibia, which you have seen.

In the course of emergency care by Dr. Schneider

(Testimony of Dr. Howard L. Cherry.)

he washed the wound externally with an antiseptic or saline solution and applied a compression bandage which was described as one which extended above the knee of the patient, and also that it was his recollection, Dr. Schneider's, that he applied a Yucca board splint of approximately 24 inches to the lower left tibia of the patient; and that the patient was then X-rayed—or he may have been X-rayed prior to the placing of the splint—and was put in a ward of the Physicians and Surgeons Hospital with his leg elevated on pillows, as indicated in the record which you have read, and that the leg was not further seen by any person at the Physicians and Surgeons Hospital, being bandaged for the entire time, from approximately 1:45 or 2:00 o'clock on June 10, 1952, to and including June 12, 1952, at about 8:00 o'clock, when he was discharged to be sent by ambulance to Seattle, Washington, for treatment at the U. S. Marine Hospital.

There was no further treatment directly to the wound site. [245]

Would you deem treatment of that type to be the proper practice for the treatment of a compound fracture of the tibia, of the lower third of the left tibia, considering also the other clinical findings which you have had opportunity to refer to, in the City of Portland, Oregon, on June 10, 1952?

Mr. Harr: Objected to, your Honor. I do not believe the facts are set forth quite accurately, in that he did not call attention to the fact that the wound was abraded, that there was a considerable

(Testimony of Dr. Howard L. Cherry.)

area of abrasion, and lacerated areas. There were two lacerations, one an inch or an inch and a half long and another shorter laceration; and then a mild antiseptic solution was applied to the area surrounding the fracture site, and that the wound was irrigated with a saline solution and, following that, a compression bandage was applied, and that bandages were wrapped around it until the leg was at least 10 inches through from the knee down to the ankle, and then a splint was applied.

I do not believe the hypothetical question is complete.

It is objected to for another reason, and that is as to what Dr. Cherry would consider to be proper or improper. If he is basing it on what specialists would deem proper, that is one thing.

The Court: This is a hypothetical question and has been [246] propounded. You can develop your theory on cross-examination. The objection is overruled.

The Witness: Your Honor, may I make a comment? I don't know if it is proper, but everybody knows this, that I have very thoroughly studied all the charts; I have read and studied the reports of the physicians; I have talked to the patient. I have deliberated this whole question in my mind for a matter of weeks. I might also state it is one of the most distasteful things I have been called on to do, to criticize someone else's work. We very much dislike doing that, but to the question Mr. Ryan asked, including the other statements made, I still have to

(Testimony of Dr. Howard L. Cherry.)

say that the treatment was not correct; it was not what he should have obtained; that if the doctor who saw him did not know how to treat it he should at least know it was beyond his scope or capacity and should have called in some other doctor to treat the patient.

The answer to the hypothetical question as put is that in my opinion, under these circumstances, this patient did not get good care in his initial treatment.

Mr. Harr: May I inquire the scope of the witness' answer, whether or not this answer goes to the first emergency treatment by Dr. Schneider or whether it goes to the 40 hours he was in the Physicians and Surgeons Hospital?

The Witness: May I answer that? [247]

Mr. John D. Ryan: It is out of order, but go ahead and answer it.

A. I would say if there had been only one gross error in his treatment, I would say the lack of adequate immediate care, nothing else, is of enough significance to be of extreme importance to me. I think there may have been a little more judgment used in some of the other things, but it does not compare in what is going to happen to this man over the months and years ahead, does not compare to this one error of not getting adequate care early.

Mr. Harr: May I ask one question, your Honor, so I will understand the doctor? Does that refer to Dr. Schneider's immediate emergency treatment?

The Court: He is talking about the period of

(Testimony of Dr. Howard L. Cherry.)

five or six hours. He said he would not let it go more than five or six hours.

Mr. Harr: He said immediate care.

The Court: He said, just ten minutes ago, that five to six hours was the time within which he would assemble the people necessary to give him the proper attention, and that if it was at 3:00 o'clock in the morning he would get them out of bed. Is that what you are talking about?

The Witness: Yes, your Honor.

Q. (By Mr. John D. Ryan): Doctor, under the circumstances under which man was suffering, what would you say would be [248] the result of the failure to treat this man within six to eight hours?

A. The result we might expect would be a great delay in healing this wound, and that might be in the form of infection—that is the thing we are scared to death about all the time—or it might just delay healing due to poor nourishment of the tissues around it.

Q. What was the result of that, from your observation of the treatment accorded this patient?

A. In observing this case, the records I have seen, I think the number of months of treatment and the number of operations and days of hospitalization and pain—I think it was very greatly lengthened.

Mr. Harr: We object to that, your Honor. There is no showing that the treatment that was made necessary seven or eight months after the accident was

(Testimony of Dr. Howard L. Cherry.)

attributable to the first 40 hours that the man was in the hospital.

The Court: He just said it was. You can dispute it, of course, but it may stand.

Q. (By Mr. John D. Ryan): Doctor, in connection with a compound fracture of the lower third of the left tibia, you have stated that there was a possibility of infection. Do you deem the site of an exposed wound of that type to be infected?

A. That is where the great importance comes in of treating [249] it within six hours. We do not consider it to be infected. Rather, we start out alerted, not that there is danger for bacteria to really contaminate it and set up an infection in that length of time, but in that length of time it can be cleaned to a degree where we would expect to close the wound and have it heal without infection. After that time, you have lost that opportunity, and you must consider that the bacteria——

The Court: Mr. Ryan, wind this up so we can conclude the cross-examination this afternoon.

Q. (By Mr. John D. Ryan): Doctor, have you familiarized yourself with the hospital records of the United States Marine Hospital regarding the treatment of the plaintiff, Amos Morin?

A. Yes.

Q. You recall he had an operation, a closed reduction, on the 12th of June at 3:03 p.m.?

A. Yes.

Q. Would you describe what that operation was?

A. I might comment that from the record the

(Testimony of Dr. Howard L. Cherry.)

record is beautiful, the record from the Seattle hospital. As far as I can tell, their care was very excellent.

This man arrived at Seattle on the 12th, I believe, unresponsive, comatose. They had taken him, in an hour or two hours, into surgery—he was still comatose—and given [250] him a spinal anesthetic. They very carefully debrided, cleaned and scrubbed this wound and closed the wound. It was very excellent, fine treatment, and if that had been done in the first few hours following his injury, it would have made the difference between a good, clean healing of the leg and one protracted over many months, healing protracted over many months.

Then the next treatment was some days later, when this original wound was fairly well healed; it became obvious to them that they would have to open this fracture and stabilize it with a bone graft and a plate. Knowing how I would feel at that time, I would be reluctant to do it, but it was necessary so that they did it. They put the plate and screws and bone graft across this fracture, and then they nursed it along. The wound was slow to heal. It gaped a little for quite a while, but finally it did heal almost entirely, and that is the time when he came down to us.

As I said in connection with these charts, the only entirely, and that is the time when he came down they might have taken a couple more X-rays during the time he was up there.

(Recess.)

(Testimony of Dr. Howard L. Cherry.)

Q. (By Mr. John D. Ryan): You say that the only comment you had to make of the Seattle treatment, after your review of the [251] record, was that they might have taken some additional X-rays?

A. Yes. That is not a very severe indictment.

Q. Doctor, would you tell us what you deem to be proper treatment of this type of injury?

The Court: You have stated that over and over. Come on, now, and wind up your examination.

Q. (By Mr. John D. Ryan): Would you explain what a debridement is?

A. A debridement is the careful cleansing and removal of all foreign material.

The Court: He has covered that over and over again. Ask him whether the treatment was responsible for the man's condition.

Q. (By Mr. John D. Ryan): Was the treatment rendered responsible for the present condition of Mr. Morin? A. Yes.

The Court: What is your prognosis in this case?

The Witness: The prognosis of this case is that he will have a deformed leg to a certain extent; he has osteomyelitis which may recur—it has a tendency to recur. He has marked tenderness and pain in his foot and ankle which of course will decrease with the years but will probably be present——

The Court: Cross-examine, Mr. Harr. You can come back [252] for redirect if you have something further to ask him about.

(Testimony of Dr. Howard L. Cherry.)

Cross-Examination

By Mr. Harr:

Q. We will all agree that there are many causes of osteomyelitis. A. There may be.

Q. You know of more than one, don't you?

A. I don't know what you mean, because osteomyelitis—the cause of osteomyelitis is bacteria. That is the only cause I know of.

Q. It can come through the wound, of course?

A. It can come through any open wound.

Q. It may come through the bloodstream, of course?

A. There is a type of osteomyelitis—well, it may be a type of osteomyelitis—that comes from the bloodstream but doesn't come from the fracture site. I think I could very accurately say that the chances of this coming through the bloodstream are absolutely nil. I don't think that can be considered here.

Q. If there were an infection in the system, a focal infection, isn't that apt to hit a vulnerable spot, say, a fracture site, especially where there is poor circulation?

A. That is quite an involved question. I can say that there may be theoretically a remote possibility of it occurring [253] at the fracture site. I would also say that I have never known it to occur; I have never seen it and, in my recollection, I have never seen it in the literature, and I would say that pos-

(Testimony of Dr. Howard L. Cherry.)

sibility is extremely remote, while on the other hand you have a very obvious reason why it would occur in a compound fracture.

Q. For instance, from the time he left the Physicians and Surgeons Hospital in Portland—he was here about 40 hours, I guess—isn't it quite possible that the infection came from the wound or from some other source?

A. The wound was closed within a matter of a very few hours after he got to Seattle. The fracture was opened one other time. Of course, I can't say that it could not possibly occur—the fracture was opened one other time to graft it under sterile conditions. I cannot say of course it could not possibly occur.

Q. You said it was open when he came down from Seattle?

A. It was open, because pus was draining out of it; the bugs were going out, not in.

Q. Does that mean that was osteomyelitis simply because there was some drainage coming out?

A. No, I didn't say that.

Q. Was there osteomyelitis, Doctor?

A. There was osteomyelitis, very definitely, and I had specimens taken at the time I took the plate out. He had [254] soft tissue infection and possibly osteomyelitis before that.

Q. Did you, before you manipulated that leg in August, did you cause a culture to be made?

A. No.

Q. Would you have manipulated the limb in that

(Testimony of Dr. Howard L. Cherry.)

manner with an active infection, if this were a perfectly clean leg?

A. I would probably open it and operated it. Manipulation causes very limited disturbance. I considered, of course, his condition, and this manipulation that I did I don't believe would do any damage in the presence of an infection.

Q. Are you able to say that there was an active infection in there? A. There was infection.

Q. That was osteomyelitis?

A. I can't prove it was osteomyelitis at that time.

Q. Then did you take the risk of manipulating these bones without knowing whether or not it was osteomyelitis?

A. If there were osteomyelitis present, it would not hurt it to manipulate it to the degree that I did.

Q. Did you put down in the record, in your own hospital record at Providence or in your own office record, the fact that there was any osteomyelitis in that wound before you took him to the hospital in January? A. Not to my knowledge.

Q. What do your office notes say about that? Have you got [255] your office notes?

A. I don't believe I have them. Do you have those notes, John?

Mr. Harr: Would you hand the witness Plaintiff's Exhibit No. 12.

Q. That is your office record, isn't it?

A. Yes.

Q. What is your history there, as shown?

A. Well, I might explain——

(Testimony of Dr. Howard L. Cherry.)

Q. Read it, on the last page.

A. I might explain we don't take full histories in our office. We have a full history, an adequate history, in the hospital and we doctors don't duplicate what we put in the hospital records, as in our office records we have notations of the operations, the hospital findings, and so on, and then each time he comes in we add a note with regard to his condition.

Q. It seems to me that you have been rather critical, quite critical, of some of your fellow members in the notes that they keep. I would like to know why your record does not show that there is some osteomyelitis here?

A. May I call your attention to what the office record is? You have, not a photostat of one sheet, but you have a complete record which consists of probably 30 sheets.

Q. You are calling attention to the hospital records? [256]

A. I am calling attention—that is our office record. Our office record contains a carbon copy of all procedures that we do in the hospital and shows all the X-rays taken and some other things.

Q. Are these sheets you are holding in your hand duplicates of the hospital records?

A. Yes. Everything we have in our office pertaining to this patient, a good deal of it is from the hospital records.

Q. Let's look at your office notes. First, I see, "October 29th, X-rays left tibia." Is that right?

(Testimony of Dr. Howard L. Cherry.)

A. Yes.

Q. Then the next note is November 24, 1952, which note says: "Hurts bad at top of plate. Fracture is solid. Try heat to area." That is your record, isn't it? A. Yes.

Q. That is right, isn't it? A. Yes.

Q. There is no mention there, of course, of any infection. That is true, isn't it?

A. Nothing mentioned.

Q. Do you mention anything of any infection there?

A. I did not record it on this piece of paper.

Q. January 24, 1953, there is a notation: "Severe inflamed skin. To Providence."

A. So we understand correctly, it is before. [257]

Q. I believe that was before you took him to the hospital? A. Yes.

Q. February 11, 1953: "To Providence; abscess opened; plate out; wound dressed; black on edges." That is all your office note? A. Yes.

Q. Now, let's look at the Providence Hospital records. Let's first look at the Providence Hospital record pertaining to the closed reduction.

A. Which admission are you referring to?

Q. I don't know. It is August 24th, I think.

A. Yes, I have it.

Q. There it says: "Admitting diagnosis: Old fracture left tibia." Is that your diagnosis?

A. Yes.

Q. Then it says: "Old fracture left tibia with

(Testimony of Dr. Howard L. Cherry.)

malalignment. Operation: 8/25/52—closed reduction.” That is the manipulation you did?

A. Yes.

Q. And then you applied a cast? A. Yes.

Q. “Complications, none,” and “Infection, no.”

Is that right? Is that what your record shows?

A. I don’t see that here. Maybe I am not looking at it.

Q. Look at the bottom. It shows Dr. J. M. Thorup signed [258] as attending staff physician.

A. Yes, but what are you referring to, do you know?

Q. I am referring to the Providence records.

A. Is that the front sheet, the diagnosis sheet?

Q. I don’t know. It is a record made at the hospital.

A. That one marked or checked is “Hospital Infection.” That means it won’t become infected in that hospital. It refers to something that is operated in the hospital. It has to do with what was done in the hospital.

Q. Was there a bacteriological report made out showing any infection?

A. There was none taken.

Q. What? A. No specimen was taken.

Q. If a specimen is taken, do they always make a microscopic examination? A. As a rule.

Q. That is the purpose of it, isn’t it?

A. Yes.

Q. If a specimen is taken?

A. It is not always done, but that is the rule.

(Testimony of Dr. Howard L. Cherry.)

Q. Let's look at the Providence admitting diagnosis on January 26th.

A. Would it be appropriate for me to mention that the wound is described in the chart, but you choose to read other pages? [259]

Q. The wound is described? A. Yes.

Q. You mean as of August?

A. Yes, this admission we are just talking about.

Q. Are you looking at the admitting diagnosis?

A. On the progress notes. This is the intern's writing; this is not mine. It would indicate the wound was not healed. That is in the progress notes dated 8/24/52. It is described as granulating.

Q. A granulating wound?

A. Yes. That means it had not healed but did have granulation present and the wound was not yet healed. Granulation is the process of attempting to heal and as long as there is granulation present the wound has not yet healed. That is in August. That sheet is some months before.

Q. Let's check the record at the hospital in January. Have you before you the January record?

A. Yes.

Q. There I notice you did diagnose it as "Osteomyelitis, shaft of tibia." Is that correct?

A. That is one of the diagnoses, yes.

Q. You made an incision and drained it, didn't you, at that time?

A. Yes, and removed the plate and screws.

Q. Before that on January 26th you say: "Right tibia." Is [260] that what you say?

(Testimony of Dr. Howard L. Cherry.)

A. Yes. That is wrong. It is the left tibia.

Q. Sometimes you doctors are a little bit hurried.

A. That is not written by me, not that I wouldn't do it, but that is not written by me.

Q. Then, on February 2nd, it says: "Removal of plate and screws, left tibia." A. Yes.

Q. Let's look at the operative record, January 26. You did make out this, did you not?

A. This record is typed on a machine.

Q. And you signed it? A. Yes.

Q. You say: "Pre-operative diagnosis, osteomyelitis right tibia." A. That is incorrect.

Q. You made a mistake here, didn't you? You have called attention to that before? A. Yes.

Q. That involves an incision and drainage. Is that what you mean? A. Yes.

Q. What you did was to open the wound a little bit and take out a small amount of pus.

A. This was about to break through. There was a considerable [261] amount of pus and it was about to break through, and we did open it up and the pus was drained, plus some flakes of bone.

Q. Then refer to the operative record covering the operation on February 2nd, the printed form, commencing with "What Was Done," and then it says, in parentheses, " (Describe pathological findings, organs explored, incision, sutures, drainage and closure)." Then you filled this in: "Incision was made lateral of the plate over the lower third of the tibia, carried down to the plate. Four screws

(Testimony of Dr. Howard L. Cherry.)

and the plate removed. The bone was smoothed off. The wound was closed with interrupted silk sutures. Compression dressing of sheet wadding and tensor bandage were applied." A. Yes.

Q. That is signed by you? A. Yes.

Q. Will you look at the pathological report dated February 2, 1953? A. Yes.

Q. Would you read that, please?

A. "Gross Examination: The specimen consists of some irregular fragments of cortical bone, four screws 3.5 cm. in length and a metal plate 15 cm. in length." Then it says: "Diagnosis: Fragments of bone, screws, metal plate."

Q. Any infection? [262]

A. There is no indication one way or the other.

Q. Who signed that?

A. That has the typewritten signature, "A. Peter Crane," and is signed by Jeff Minckler, Pathologist. That doesn't determine whether there was infection or not. When pus turns up, you don't need to determine that by taking specimens. That was merely a record of what was done at that time. It probably would have been better if we had. If we had known it would come to court, we would have got cultures and some specimens.

Q. You, of course, knew that there was some drainage. You said the record shows the week previous you took out a small quantity of pus. That was apparently at the surface of the skin.

A. I didn't say a small quantity.

(Testimony of Dr. Howard L. Cherry.)

Q. You said it was going to force itself out, so you knew that there was some infection there?

A. Yes, I knew that there was infection.

Q. Did you find, in making your incision, that it was granulated down to the bone? Was there granulation there?

A. There wouldn't be granulation tissue down to the bone.

Q. Down to the bone?

A. I don't believe so. The pus was coming from the bone, and there were flakes of bone in the pus, indicating that there was an infection of the [263] bone.

Q. Flakes, what are they?

A. They are portions of bone.

Q. Were these little segments sequestered?

A. Yes.

Q. In other words, they were detached and away from the bone proper? A. That is right.

Q. The bone itself was pretty well healed, wasn't it? The healing was good?

A. In saying that it was healed there are two things we are concerned with. One is the healing of the fracture. I didn't take the plate off until it was healed. The infection was still there. There were little chips of bone floating in the pus.

Q. You did not find that infection in that wound when you first saw him in August?

A. In August we didn't get down to the bone. To the best of my knowledge, there wasn't pus present coming from the bone. The tissue was very

(Testimony of Dr. Howard L. Cherry.)

poor and it had not healed after months—it didn't have, to my knowledge, pus coming from the bone, if that is your question.

Q. If there is infection in a wound, a compound fracture site, how soon would that be apt to manifest itself?

A. Well, we have what we call a latent infection. That is, it can be in there right from the first—pus can be [264] pouring out of the wound and no healing going on at all or, it can be, as this case was, a low-grade latent infection that could flare up any time, and it could flare up from now on.

Q. That is your opinion now?

A. You asked me how it ordinarily showed up, and I was telling you how it can occur. Do you want to know in this case what I think it was? Is that what you are asking?

Q. Here we have a shin-bone and the bone is immediately next to the surface with a small skin surface.

A. Well, a very small amount of skin.

Q. If there is infection in that wound, it is right next to the surface, isn't it?

A. Actually, in this case if it were infected, I think it would be close to the skin, but it might be deep. I don't think it was in this case, but I say it could have been.

Q. The circulation was bad down there, you say. In any wound of this type, poor circulation, light circulation, might of course result in a bad result?

A. As far as circulation is concerned, this was

(Testimony of Dr. Howard L. Cherry.)

infinitely worse than if you, by some means, had obtained a primary healing of this wound. It is an area where we have to be very careful about the circulation.

Q. Let's go to the matter of the hospital treatment in Portland. It has been your testimony that the administering [265] of the Deprapanex was a measure to offset the ileus? A. Yes.

Q. To increase circulation? A. Yes.

Q. I think you said in your direct examination you did not use it, and you did not exactly know what it was good for.

A. The last time I used Deprapanex was, I would say, ten years ago; used it at that time to increase circulation in the leg. I am unaware that it is used for an ileus. It must be or they would not use it. We don't happen to use it. There are lots of drugs; we don't use them all.

Q. Isn't it good practice to first consider the patient's over-all general condition?

A. Yes, extremely good practice.

Q. Consequently, in the case of a man who has sustained an injury such as this man sustained to his back and to his leg, and considering the severe pain that he was undergoing, wasn't it good practice to take steps to guard against shock?

A. Surely.

Q. Wasn't rest and sedation a part of that?

A. No. I can answer that by saying no. Could I amplify that?

Q. Do you think that would be good practice?

(Testimony of Dr. Howard L. Cherry.)

Q. (By Mr. John D. Ryan): Go ahead and explain your answer. [266]

A. This man, as illustrated by the chart, was not himself. There was danger of going into shock. They used the means, which is excellent, of preventing shock, which is the use of blood. They had it ready, but the fact is that he did not go into shock or they would have given him blood. If he had started in shock, they would have given him blood. They didn't order it. They didn't order blood pressures taken as they would if he were going into shock or was already in shock. That can be determined in two or three ways.

Q. You are speaking, of course, now as an orthopedic specialist?

A. I would speak as a doctor. I do not think any doctor who treats people should treat on two standards, for I think a doctor should know his limitations. If he does not know that he can do it, he should know that he doesn't know. I do not criticize anybody in not being able to take out a brain tumor, but he should know, in the presence of certain symptoms, that he should call in somebody that could treat it.

Q. I know there is a lot of scuttlebutt and second-guessing, Doctor. When you have a young doctor, such as Dr. Schneider, who spent his internship in one of the leading hospitals of the United States, which had a very great number of emergency surgery cases, and he tells you, as he told us here and in [267] his deposition, about cleansing the

(Testimony of Dr. Howard L. Cherry.)

wound thoroughly, and that he put a dressing on, you would not be able to say that that man, being on the ground, after viewing the patient and knowing his condition, seeing him writhing in pain—do you not come along now and tell him, “Doctor, you did it wrong,” that second-guessing is always best? In other words, isn’t he——

A. Do you want me——

Q. Isn’t the doctor the best judge of what to do in these cases?

A. Can I answer your first question—I think it was the first. The answer is Yes, and just as wrong as can be. What was your other question?

Q. I think the last question was: Isn’t the doctor in attendance usually the best judge of what is to be done for the patient, having done the cleaning and applied the splint and provided the immobilization and the X-rays? Isn’t his judgment usually the best to follow?

A. Now I would like to answer that. The position of a resident in a hospital——

Q. He is a qualified doctor. He is admitted to practice medicine.

Mr. Ryan: Just let him answer the question.

A. The position of a resident in a hospital is to cover emergencies, to inform the doctors as to what is going on and, [268] under their guidance, to do what the doctor says.

I don’t know your Dr. Schneider. I don’t know him when I see him at all, but anyone who had had adequate training and had seen compound

(Testimony of Dr. Howard L. Cherry.)

fractures should know that you don't treat them by wiping something over them and putting a dressing on them. The other part of that is that resident is not responsible for the case. It is not the resident's case; it is someone else's case.

Q. I know that.

A. And somebody else did not deem it important enough, if it was a compound fracture, to come up there——

Q. You are volunteering some information, now. Are you acquainted with a textbook on surgery——

Mr. John D. Ryan: There is contention in the pretrial order that both Dr. Leonard and Dr. Craig were informed of the existence of the condition. He is not volunteering testimony.

Q. (By Mr. Harr): Are you acquainted with a textbook on surgery by Christopher?

A. I know of the existence of Christopher's book. It is a general surgery book. I have not studied it particularly, but I know there is such a book.

Q. The part I am going to refer to pertains to the operative treatment of fractures, written by Paul B. Magnuson, Chairman of the Department of Bone and Joint Surgery, Northwestern [269] University Medical School.

A. Yes, I know him.

Q. I am reading from Page 708 headed "Choice of Time for Operation."

I am just going to read this and ask you whether or not you agree:

(Testimony of Dr. Howard L. Cherry.)

“It is fairly generally agreed among surgeons that the choice of time for operative intervention in cases of fracture is from five to ten days following occurrence. This gives sufficient time for the tissues to recover from trauma and for the blood clot to organize, and yet not sufficient time to allow callus to form. The swelling is less, and bleeding at operation is less if this rule is followed. It also permits healing of abrasions in the neighborhood of the fracture.”

Do you agree or disagree with that statement?

A. He is talking about simple fractures. If you read the rest of that, you will find that refers to a simple fracture. We are talking about a compound fracture. If he discusses compound fractures, he will not say that. As to simple fractures, that is very excellent.

Q. I will read as to compound fractures. He says on Page 704:

“Shock and hemorrhage are frequently grave and [270] attention must be devoted to them first.”

Is that proper?

A. Absolutely. It takes up to an hour or two hours to replace blood and get them out of shock, but this man was not in immediate shock, so that does not particularly apply to this case.

Q. Do you have in your medical library Campbell's "Operative Orthopedics"? A. Yes, sir.

Q. That is, your counsel has it?

A. Yes. It is written by a very well-known orthopedist.

(Testimony of Dr. Howard L. Cherry.)

Q. It states that the requirements of proper treatment begin with pre-operative care of the patient, and, regardless of the nature of the operation to be performed, the patient's general condition must be first thoroughly studied. I think we have already agreed about that? A. Yes, sir.

Q. Reading on Page 10:

"Treatment of shock * * * essentially that described above,"

and then it says:

"Time is an important factor. Surgery must be delayed until treatment of shock has become effective."

You would not disagree with that? [271]

A. I would not disagree with it, but this patient was not in shock, but if they are in moderate or even severe shock, they can be prepared for surgery usually within two or three hours. That does not mean days or 40 hours or anything else.

Q. You may be able to look at the hospital record and say that the hospital record does not disclose that he went into shock, but at that time and place would you have been prepared, had you been the doctor, to say that he wasn't going into shock?

A. I would say this, that with these injuries, with these potentials, he very well might have gone into shock, and that you should consider it, absolutely; but I also say that his blood pressure was 140 over 90 and when the blood pressure is 140 over 90 he is not in shock, and that there is nothing in there that indicates that he was in shock.

(Testimony of Dr. Howard L. Cherry.)

Q. You don't think the pulse being 112 is particularly indicative? ..

A. I don't think that pulse is.

Q. Reading from Page 374 of Campbell's "Operative Orthopedics," it says:

"In the accomplishment of this purpose in compound fractures the treatment of the wound and the prevention of pyogenic and clostridial infection assumes primary importance." [272]

A. Yes.

Q. "The object of emergency treatment is the conversion of a contaminated wound to a clean wound, thereby promoting early healing of the soft tissues, and the conversion of a potentially infected open fracture to a healed, closed one. Treatment of the fractured bone is secondary to the prevention of infection."

A. Absolutely correct.

Q. Are you able to say Dr. Schneider did not consider that, when he cleansed the wound, put a dressing on it, a sterile dressing, and closed it?

A. I would say he gouged out the wound.

Q. Were you there?

A. No, but I read his testimony.

Q. A lot of people are strong for this so-called debridement——

A. I think any orthopedist should clean the wound or anyone who treats a fracture properly would clean the wound.

Q. That is what Dr. Schneider says he did. There may be some question in your mind as to whether he did it thoroughly or properly.

(Testimony of Dr. Howard L. Cherry.)

A. Cleaning a wound is not just a surface affair, but cleaning it down as far as it goes. You cannot adequately clean a wound in a conscious patient without an anesthetic. [273]

Q. You don't think the irrigating was adequate, then? A. Not just irrigating the surface.

Q. When you said his Seattle record showed most excellent treatment, did you read there where they got down and scrubbed inside the wound?

A. Yes, they did, as I recall it.

Q. I don't think they did.

A. May I read it? I don't know really. I don't remember that.

Q. We will give you a chance to look at it later.

Mr. John D. Ryan: Would he be permitted to read it since he has asked the question so he can give his answer?

Mr. Harr: We won't take the time now.

The Court: I have something to say about that. Stay on the main line.

Q. (By Mr. Harr): Continuing reading from Campbell's "Operative Orthopedics":

"The first consideration is the patient's general condition. Emergency measures are frequently necessary to combat pain, hemorrhage and shock."

Do we agree that he took any measures to prevent and combat pain? A. Surely.

Q. And to combat shock? [274]

A. He ordered blood; he didn't use it; didn't have enough shock to warrant using it.

(Testimony of Dr. Howard L. Cherry.)

Q. "Thereafter, attention is directed to the local condition. From the time of injury until the patient is ready for the local preparation, the wound should be protected by a dressing and the extremity splinted."

Is that what Dr. Schneider did?

A. Yes, and all this could be done in about fifteen minutes, and then he could go to surgery and get it fixed. The only element in my mind at all is the time element. That is the only thing and it is of extreme importance.

Q. You may be of the school that thinks there is only one way of treating a fracture. Won't you agree that there is more than one way of treating a fracture, a commonly accepted way of treating it?

A. Let me say this: There are a hundred ways of treating a fracture; but if it is a compound fracture, it should start with very adequate cleaning of the debris and closing the wound, if possible, and from there on in they can be treated in many ways.

Q. When you read texts about debridement, you also see that they excise the wound, don't they?

A. Sometimes.

Q. And cut away the tissue around it? [275]

A. Yes.

Q. Isn't the modern theory getting somewhat away from that excising——

A. The modern theory? I don't like the word "theory." The modern practice and the only modern practice I know of is to take away the dead tissue. You don't cut away much of live tissue.

(Testimony of Dr. Howard L. Cherry.)

You conserve all the live tissue you possibly can.

Q. Also reading from Compere:

“Two primary considerations must be kept in mind in planning the management of compound fractures. The first is prevention or treatment of shock, for the immediate preservation of life. Second is the prevention of infection in the wound.”

Do you agree with that?

A. Yes, absolutely. It would be interesting to read that whole chapter.

Q. Then it sets forth the emergency care at site of accident: First, to give morphine and, second, to treat shock and clamp the blood vessels, the severed blood vessels.

A. What does it say about a fracture being an emergency, a compound fracture?

Mr. John D. Ryan: Right in the same paragraph you are reading there, Page 58. [276]

The Witness: That is a different edition.

Mr. Harr: Well, it says the primary consideration in a compound fracture——

Mr. John D. Ryan: Read it.

Mr. Harr: You can read it.

The Court: I can read it, too, after this is all over.

Q. (By Mr. Harr): Most authorities will agree that is the first consideration.

A. The very text you brought out and read to the Court says right down the line that you must treat the patient for shock, if shock is present; then you must clean the wound and clean it adequately.

(Testimony of Dr. Howard L. Cherry.)

Every one of these authorities have said that, and that is what I maintain as strongly as I can here.

Q. Campbell divides fractures into three types?

A. Yes.

Q. That is, compound fractures?

A. Yes, that is right.

Q. One with a laceration of an inch and a half, would you say that would come under Type 1?

A. I would say Type 2 in Campbell's classification.

Q. Would you say that was a wound of moderate or massive size?

A. What does it say? Read it, will you.

Q. Type 1: "Small puncture wounds caused by a protrusion [277] of bone from within out——"

A. Now, Type 2.

Q. And then it says: "——or by a bullet passing from without in, minimum damage to soft tissue."

Type 2: "Wounds extensive in length and breadth, but with little or no avascular, or devitalized soft tissues and relatively little foreign material."

A. Yes, I would classify this as Type 2. I don't believe there is much foreign material in this. I have seen nothing to indicate that there was. If there was, however, that is, if there was a lot of dead tissue, it would be Type 3. I believe this falls quite clearly into Type 2.

Q. Could it be your opinion might be wrong?

A. Yes, I have heard quite a little discussion about this.

(Testimony of Dr. Howard L. Cherry.)

Q. From Page 376:

“For small puncture wounds induced by indirect violence, the preliminary cleansing is usually sufficient. The serrated borders of the skin are excised, and the wound loosely closed. Probing in the wound, and injection of antiseptic solutions are contraindicated, since these measures induce additional organisms into the wound and disseminate those already present.”

Would you agree with that?

A. Yes, that is fine. That is Type 1, a very [278] small puncture wound from the inside.

Q. So, to go into the wound itself might be bad policy, if it is a small puncture wound. Would an inch-and-a-half wound be so construed?

A. No.

Q. If the doctor in attendance would so consider it, would you be in a position to say the way he treated this man's wound, by cleansing it and bandaging it and immobilizing it in the manner he did was wrong?

A. Yes, in my understanding of what this wound was like, I would consider it wrong; yes.

Q. All you know about what it was like is what you have read in the record? That is right, isn't it?

A. I had that source of information, by the record and by mouth. I didn't see the wound; that is correct.

Q. Is there not, Doctor, a respectable segment of medical opinion that would differ from what you

(Testimony of Dr. Howard L. Cherry.)

have testified to as to what should be done or what should have been done?

A. I don't really believe so. There is one thing that is different that I might bring out, and that is the treatment of war wounds. Often, war wounds where there are severe compound fractures are treated in the manner indicated. There are two reasons, the first being that they very frequently cannot be taken to a hospital, or usually cannot be taken to a hospital within the critical period; [279] and the second is they come in such great numbers that time cannot be spent by the limited number of doctors available. To the best of my knowledge, anybody who knows about compound fractures, in civilian practice, where you can get them to a hospital soon and have the facilities, would clean it carefully and close the wound promptly. The only exception I can think of in good, modern medicine is in the case of war injuries where it is impractical from a hospital point of view.

Q. You do know that there is respectable authority that would suggest the very treatment that was provided, to immobilize the wound after seeing that it was thoroughly cleansed and putting the patient to bed, and the general conditions observed?

A. I really honestly don't believe that any good medical practitioner, presented with all of the facts, knowing the condition of the wound and the type of fracture, and so forth, would honestly get up here and say that that was the correct way of treating this.

(Testimony of Dr. Howard L. Cherry.)

Q. Let's assume that practice was entirely wrong. If it is true, as our doctor testified, he got an ileus on the second day and that his condition became stabilized at the end of the second day, and that on the morning of the 12th of June, 40 hours after the accident occurred, approximately, he was transferred to Seattle. He was a little over four [280] hours on the way. Do you believe that four hours to be critical to his well-being, the time factor in itself, or the delay?

A. The time factor itself, after 40 hours—no, I don't think that time factor is an issue in my opinion in this case.

Q. In being transported in a modern ambulance—this particular one was a Cadillac, a 1952 Cadillac—and they had, so the attendant says, a pillow under his back to flex his back, and his leg elevated, and he was contained on the sides with a rail, and was transported in that manner—in your opinion, that four-hour delay should not have caused his condition to deteriorate or be a factor——

A. No.

Q. —in whether or not his present condition was due to the early initial six- or eight-hour treatment you speak of?

A. I would like to answer those questions one at a time. I do think by far the most important thing is the six- to eight-hour period, which I referred to. I do not think the four hours' difference in treatment at the end of the 40 hours makes a bit of difference. I know that these Cadillac ambu-

(Testimony of Dr. Howard L. Cherry.)

lances ride beautifully, although they are not the same as sitting in bed with a nurse and attendants, but they ride beautifully; but if this man was injured and was [281] almost comatose when he got there and had suffered an ileus, there should be some awfully good reason, more than a few dollars, to warrant taking him 200 miles.

I am not making an issue of this. If that were the only thing involved, I don't think there would be much point in discussing this, but I don't think it is very good practice.

Q. You think it would have been injurious to him?

A. I think he probably was not as good after having taken that ride as if he had stayed in bed. I think it was very much to his benefit to go up there and get a doctor, yes, rather than just to lie here, but I do not make a strong point at all of the ride.

Q. He told you, did he not, that he passed out when he first reached the emergency surgery, that he was brought in, put on the table and the attending doctor inquired whether or not it would be all right to cut his trousers away, and then he passed out and he did not recall anything else until around four or five days later in Seattle. That was his testimony.

A. I didn't hear the testimony. I don't recall that. I recall him telling me he didn't go to surgery. That was from his own memory. Whether it was

(Testimony of Dr. Howard L. Cherry.)

reconstructed, however, I don't know, but I didn't hear from the testimony.

Q. Well, he was very heavily sedated on that trip; he [282] certainly did not suffer?

A. Oh, I think he got over it all right. I will answer your question this way: I don't think that is the critical point here. If the reason he was not given earlier treatment was so he could be sent there and the treatment postponed, I think then the ambulance system is wrong. If that system is substituted instead of adequate early care, I think it is wrong.

Q. You testified, as I understood you, that a fracture in the area of the lower third of the tibia is one of the worst places to have a fracture?

A. That is one of the worst places as far as circulation is concerned. I would much rather have one there than in my neck, for example, or my hip, but as far as circulation is concerned that is one of the poorer places to have a fracture, one that requires very careful care because of poor circulation.

Q. For that reason it is not at all uncommon, regardless of the treatment that is given, for them to develop osteomyelitis?

A. With the modern method, in good hands and with the giving of antibiotics, you seldom see it. You see it, yes, but not very often when they are in good hands and there is early treatment, in a clean wound like that.

Q. You thought he was well enough to return

(Testimony of Dr. Howard L. Cherry.)

to work, did [283] you not, in the first part of December?

A. He had assured me his job was not a hard one, and I thought it was not much different for him to be doing that kind of work than to be staying at home.

Q. That was within six months of the time the accident occurred?

A. Yes. Ordinarily, he would have been well.

Q. All that time you were his doctor and would treat him? A. Part of the time.

Q. Well, from the time he came from Seattle.

A. I was his doctor. I don't recall the dates; whatever dates have been used here, yes.

Mr. Harr: I think that is all.

The Court: Take five minutes more, Mr. Ryan, if you need it, on redirect. If you don't need it, don't take it.

Redirect Examination

By Mr. John D. Ryan:

Q. You have been handed Plaintiff's Exhibit No. 3, the U. S. Marine Hospital record. Would you look through that and find the pathological report that is contained in there?

A. You don't know how far down it is, do you?

Q. You have seen that pathological report, previously, have you? A. Yes. [284]

Q. What does it say?

A. Yes, I have seen it.

(Testimony of Dr. Howard L. Cherry.)

Q. Are you aware of what it says?

A. It says that the fragments of bone submitted showed no evidence of these fragments being involved.

Q. Were those taken out after the July 19, 1952, operation?

A. I don't recall. It would be one of the other operations. He had two up there.

Q. Would you state the medical significance of that finding?

A. The medical significance is that he did not have osteomyelitis in that particular piece of bone. I may further say that in my opinion he probably did not have osteomyelitis in that bone.

Q. To determine the infection, what further steps should have been taken?

A. A very logical step would be to get a culture. Sometimes you don't need it, but it would help you to find what the organism is.

Q. Have you seen Dr. Hunter's report, Defendant's Exhibit 24?

A. I have.

Q. Would you give the significance of that?

A. It is the same thing. I don't know what these specimens were or when they were taken. In Dr. Hunter's report he says [285] he found the pieces of tissue that had been brought to him for examination had not caused osteomyelitis.

Q. You said the indicated treatment was cleansing, debriding and closing the wound?

A. And sedation, that being less important than the others.

(Testimony of Dr. Howard L. Cherry.)

Q. In this Type 1 treatment from Campbell's textbook that Counsel has read from, he indicated it should be loosely closed. What would "loosely closed" mean?

A. That means to close the wound, suture it and not drain it too much.

Q. Was that done in this case?

A. Not to my knowledge, not until going to Seattle.

Q. You have been handed, Doctor, X-rays from the Physicians and Surgeons and the X-rays from the U. S. Public Health Service, Exhibits 2-A and 2-B and Exhibit 3.

I will ask you to look at Exhibits 2-A and 2-B and compare them with Exhibit 3, which is one of the Physicians and Surgeons exhibits here, purporting to be an X-ray of the lower third of the left tibia, and compare it with the X-ray of the lower third of the left tibia taken upon arrival of the patient at the U. S. Marine Hospital in Seattle.

A. Very obviously it is the same leg and shows the same fracture, the main differences being that there is a little more displacement in the Seattle film than there was in the Portland film, and that there is a bandage around the leg [286] with a series of eight bandage clips. It is not too heavy a compression bandage, not as heavy as I would expect from the description given, but there has been some displacement of the fracture.

Q. What is the significance of the displacement?

(Testimony of Dr. Howard L. Cherry.)

A. In displacing it, it has a little more damage to the soft tissue.

Q. Would that be attributed to the nature of the bandage?

A. Well, the bandage was not enough to completely control the fragments. I don't know if that is terribly important at this particular time, but it was not enough to completely control it.

Q. What kind of specialist would you deem should be called as a consultant in a case of this kind in Portland, Oregon, at Physicians and Surgeons Hospital on June 10, 1952?

A. I cannot answer that question very accurately, speaking of the Physicians and Surgeons Hospital, because I am not well acquainted there. In Portland orthopedic surgeons do almost all acute compound fractures. It is my understanding it is not as much that way in Physicians and Surgeons as it is in the other hospitals.

Q. Do orthopedic surgeons practice at Physicians and Surgeons Hospital? A. Yes, they do.

Q. Is there a means or a way by which an orthopedic surgeon [287] is available in the City of Portland, during that time in 1952, I mean, for the treatment of such cases? A. Surely.

Q. Would you tell us what it is? Would you tell us how to go about it?

The Court: Never mind that. Are there any more questions, Mr. Harr?

Mr. Harr: I do not think I have any more questions. I was going to ask the indulgence of the

Court. I have one witness from Seattle that I would like to call at this time.

The Court: How long will it take?

Mr. Harr: Fifteen minutes, I believe. [288]

DR. GEORGE MAGID

produced as a witness on behalf of Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Your name is Dr. George Magid?

A. Yes.

Q. You are presently residing in Seattle?

A. Yes.

Q. Are you in private practice in Seattle?

A. At the present moment, yes.

Q. Would you state where you went to school and interned?

A. Chicago Medical School, graduating in 1951; interned in U. S. Marine Hospital in Seattle and, following that, I was assigned to Portland, Oregon, at the out-patient clinic downstairs here, the U. S. Public Health Service, where I was on duty at the time Mr. Morin came in.

Q. You have been handed Defendant's Exhibit No. 20——

The Court: Tell us what 20 is.

Mr. Harr: It is a photostatic copy of the hospital record, which I wish to substitute for the original.

Mr. John D. Ryan: No objection at all.

(Testimony of Dr. George Magid.)

Mr. Harr: I will ask you if in June, 1952, you were with the U. S. Public Health Service here in Portland, Oregon?

The Court: He said he was. [289]

A. Yes. No, not in June, 1952. I was still at the U. S. Public Health Service Hospital in Seattle as an intern.

Q. (By Mr. Harr): You came down to Portland——

A. In July, 1952.

Q. Would you look at that record, Exhibit No. 20, the out-patient record of U. S. Public Health Service, and tell the Court what you know about the treatment of Amos Morin?

A. I first saw him, Amos Morin, November 5, 1952, and he reported to me this entire story which I recorded to the best of my ability, and I will read it off.

Q. No. The history is substantially what you have heard here before. Eliminating the history, would you tell us what you observed and what your impression was?

A. When I saw him, he had a leg cast on the left leg which had been placed there by Dr. Cherry, I believe, according to the patient's story about, let's see, about a week before I saw him—it had been removed about two weeks before I saw him and the patient began walking, and then the patient told me that the pain was so severe that he went back to Dr. Cherry and the cast was reapplied the week before I saw him, and he came in to me, and had been walking with that cast around his leg.

(Testimony of Dr. George Magid.)

Q. Did you know he was under Dr. Cherry's care at that time? A. Yes.

Q. All right. Tell us what you next saw. Did you take [290] X-rays?

A. Then I called Dr. Cherry by phone and Dr. Cherry said, according to my notes here, that when he saw the patient first there was a little angulation at the fracture site, although the healing was almost complete; he reset it and put a new cast on, and said the healing was almost complete, and the patient was given a shorter cast below the knee with a walker on the cast; since then the leg became swollen and was slightly painful, and he was advised by Dr. Cherry to return to his office one week afterwards for X-rays.

Q. You saw him next when?

A. I believe that might be wrong—I believe I advised him to return to my office in a week for an X-ray. In the meantime I kept him off duty entirely, as far as the Public Health Service was concerned.

Q. In other words, he had returned to the Public Health Service and asked them to resume treating him, is that right? A. Yes.

Q. All right.

A. I gave him some APC, 10 grains every four hours, as needed for pain. He wanted some sleeping pills to help him sleep and I gave him some of those.

Q. What was the condition of the wound when you first saw him? [291]

A. The wound was healed. There was no open

(Testimony of Dr. George Magid.)

wound. There was a cast on it; the left knee was slightly swollen and was giving him some pain.

Q. At the time the cast was off when you saw him you say the wound was healed?

A. The cast wasn't off at first.

Q. Yes, but when the cast was off did you observe the wound?

A. Then he came back in a week and X-rays were taken at the time he came back, and they were reported on by the roentgenologist, and they showed the healing was not complete, although I believe the report shows that the callus formation was strong enough to support his weight.

Q. That is what the X-ray showed?

A. The X-ray report.

Q. That the healing was not quite complete. Go right on from one note to the other, if you will.

A. And then on the 17th of November he came back in and I removed the cast, and there were no openings in the skin that I can remember. I didn't record them, whether there were or not. However, I recorded the fact that there was solid healing. By that I mean that the X-ray report and my attempted movement of the fracture site showed the healing was pretty solid.

Q. Your notes say that on November 13, 1952, the X-rays [292] showed the healing as not complete. Then, one week later, or on the 17th of November, you note, "Solid healing." You don't make any note of any X-rays, so can you state from that

(Testimony of Dr. George Magid.)

note whether or not you are referring to the bone or the wound?

A. I believe I was referring to the wound first, and then from the fact that the X-ray report said healing—the callus formation was sufficient to support the use of the leg.

Q. Go on to your note of November 20th.

A. “Returns, walking with heavy limp; putting weight on leg; no pain except in ankle.”

I measured the legs at the calf, and his left leg showed 37 inches and his right leg 37 inches. Swelling of the calf was not appreciable at all.

Q. Then you state, “Fracture site is strong and unmovable.”

A. Yes.

Q. What do you mean by that?

A. Just as I said.

Q. Then your notes show: “No pitting edema.” What do you mean by that?

A. There was no edema. That is, when you would press in, the pitting would remain.

Q. And stay pinched, otherwise?

A. Yes.

Q. Then the next time would be November 26. You have a [293] note: “Returns to pain over superior edge of plate just under skin. This only felt when puts weight on leg. Has noticed this since Saturday and has not put weight on leg since then. Skin thin. Discoloration over anterior part of tibia. Healing fracture. X-ray at radiologist.”

That was your note on that day, was it not?

A. Yes, and I also advised him to walk less on the leg.

(Testimony of Dr. George Magid.)

Q. On December 1, 1952, there is a note: "Definite improvement in pain; now only light in area of plate and can put weight on it without pain. Walking around with cane." Was that your next entry? A. Yes.

Q. December 5, 1952: "Put on light diet. Will return in two weeks; feeling well; walking around." That is your entry on that date, is it? A. Yes.

Q. December 22, 1952: "Have patient certificate for full duty. He limps as yet; weakness of left ankle." Then it says: "Returns three weeks." Was that your entry on that date? A. Yes.

Q. In your last examination was his leg without a cast? A. Yes.

Q. Would you say as to whether or not the bone was solid and the wound was healed? [294]

A. Yes.

Q. They were? A. Yes.

Mr. Harr: You may examine.

Cross-Examination

By Mr. Thomas H. Ryan:

Q. Do you have any independent recollection of any of this?

A. Some of that, but not completely without trusting to the notes.

Mr. Thomas H. Ryan: That is all.

(Witness excused.)

(Thereupon Court was adjourned until Friday, July 23, 1954, at 10:00 o'clock a.m.) [295]

Friday, July 23, 1954—10:00 A.M.

(Mr. Luckey was thereupon excused by the Court from further attendance on this trial.)

Mr. Thomas H. Ryan: At this time, your Honor, I believe Counsel has agreed to stipulate that the hospital and doctor bills as represented in Plaintiff's Exhibit 26 are reasonable charges, and with that I believe we will close our case.

There is another item that will be helpful to the Court in deciding this case. I would like to call attention to Page 5 of the pre-trial order where we have listed the time loss. I have not totaled them, but the items come to the amount mentioned by Mr. Morin in his examination. Plaintiff rests.

(Plaintiff rests.)

Mr. Harr: With reference to the time lost, we might have to check to see if there is any portion of that that the Government had already allowed him by virtue of annual or sick leave, consistent with our position, as your Honor knows. [296]

Defendant's Testimony

BORIS OSHER

produced as a witness on behalf of Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Captain, you are now on duty with the U. S. Public Health Service in Portland, Oregon, are you not? A. Yes, sir.

Q. What is your capacity? What is the capacity in which you work with the Public Health?

A. I am a pharmacist's administrative assistant.

Q. How long have you been with the Public Health Service? A. Almost four years.

Q. You have been in Portland how long?

A. Almost two.

Q. Were you connected with the Portland office of the U. S. Public Health in November of 1952?

A. Yes, I was assigned here in September.

Q. When you were on duty downstairs with the U. S. Public Health Service, did you become acquainted with the plaintiff, Mr. Amos Morin?

A. I saw him there.

Q. You knew him, did you, by sight?

A. I knew him by sight and by name. [297]

Q. I will ask you whether or not you had occasion to be present on November 17, 1952, when Dr. Magid removed the cast?

A. Yes. Dr. Magid removed the cast, and directly next to the room in which he removed the cast is

(Testimony of Boris Osher.)

the diathermy room, and I was standing in the diathermy room when Dr. Magid sent Mr. Morin in for diathermy treatment.

I heard Dr. Magid describe to the patient how beautifully healed the leg was, and I also had occasion to notice it when Mr. Morin had his leg in the diathermy apparatus.

Q. How close were you to the wound at that time and to Mr. Morin?

A. I would say within six feet.

Q. Are you familiar with prescriptions that are issued at this station? A. I am.

Q. Have you had opportunity to review those prescriptions since this trial started?

A. I have.

Q. Did you examine the prescriptions that were given at each of the dates that the plaintiff came to the station, to wit, November 5, November 13, November 17, November 20, November 26, December 1, December 5, December 19, December 22, 1952?

A. Yes, I have all those. [298]

Q. Have you found in any of the prescriptions that there was any prescription for antibiotics of any kind?

A. No. There is no prescription for any antibiotic medication at all. The only prescriptions I found for this patient were prescriptions for aspirin, for APC and Nembutal.

Mr. Harr: You may inquire.

Mr. Thomas H. Ryan: No questions.

(Witness excused.) [299]

DR. JOHN E. LEONARD

produced as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Dr. Leonard, you are a duly licensed and practicing physician and surgeon in the City of Portland and State of Oregon? A. Yes.

Q. How long have you been a licensed physician? A. My license was granted in 1923.

Q. Would you state where you got your education, just briefly? A. University of Oregon.

Q. When was that?

A. I graduated in the class of 1923.

Q. Will you state where you got your internship and your initial training?

A. I interned at St. Vincent's Hospital in 1923 and 1924. In 1924-25 I was assistant to Dr. Pettit. In 1925 I went with Dr. Samuel Slocum and I was with him for a period of 12 or 13 years until his death.

Q. Any other doctors?

A. Well, in that time I was quite close to Dr. Charles R. McClure. [300]

The Court: Yes, I know him. I know about Dr. McClure.

The Witness: He helped me a good deal and advised me, and I helped him, and we worked together quite often.

The Court: Is he living, do you know?

(Testimony of Dr. John E. Leonard.)

The Witness: Yes, he is.

The Court: Retired, though?

The Witness: Yes, but he does some examinations, but he is retired.

Q. (By Mr. Harr): I first became acquainted with you in 1928 when I was adjusting some insurance. At that time I believe you were over with Dr. Slocum, is that right? A. Yes.

Q. Was that in the Mohawk Building in Portland? A. Yes.

Q. Dr. Slocum was the head man in charge of the National Hospital Association?

A. He did surgery for them, and Dr. Sabin did surgery for them.

Q. You worked under Drs. Slocum and Sabin?

A. I was Dr. Slocum's assistant.

Q. During all of that time, from that time to the present, have you devoted your time and experience to general surgery? A. That is right.

Q. There is a controversy here or, I should say, there was a controversy here involving the Medical Society. During that [301] time were you a member of the Society?

A. No, I was not. We had no personal enmity, but I felt I wanted to run my own business the way I wanted to.

The Court: I know all about that. That was all brought out in the Medical case.

Mr. Harr: Yes, I appreciate that.

Q. Subsequently, however, you became a member of the Society?

(Testimony of Dr. John E. Leonard.)

A. Yes, and I am a member now.

Q. Are you acquainted with Mr. Amos Morin, the plaintiff in this case?

A. My recollections are very vague. He says I saw him, and I most assuredly did, but as to looking at his face now, I would not be able to say he was the man.

Q. The records of the Physicians and Surgeons Hospital show that you were somewhat in charge of his case during his stay at the Physicians and Surgeons Hospital from 1:15 of June 10, 1952, and 8:00 o'clock the morning of June 12th. You are familiar with those records, are you not?

A. I remember seeing on the record that I saw the man, and I will say that I certainly did see him or it would not have been there.

Q. The Physicians and Surgeons Hospital at that time had, as residents, Residents Drs. Schneider and Stalder? A. Yes. [302]

Q. Had you been working with those doctors somewhat closely for some period of time?

A. Yes; during those boys' residency at the hospital I was very close to them. I had known them prior to that. As a matter of fact, they served at Physicians and Surgeons and then Dr. Stalder went to New York for his internship and Dr. Schneider went to Ancker.

Q. Did you happen to know from other sources of the type of hospital Ancker Hospital is, whether it is a good hospital or whether or not they have a lot of surgery there?

(Testimony of Dr. John E. Leonard.)

A. I think it is one of the best hospitals for surgery, emergency work, that there is in the country. I have not seen them all, but why I am particularly impressed and know is that my son-in-law just finished his internship there this year, and I was back there with them during the holidays. All of the accidents and all the emergencies that happen in St. Paul go through Ancker Hospital, and they have terrific service.

Q. With that background, did you have every reason to have full confidence in his judgment and in the way he treated patients? A. Yes.

Q. May I ask you if you relied somewhat on the judgment and treatment that he accorded?

A. Yes.

Q. And the attention he gave? [303]

A. Yes.

Q. The record shows, or the testimony has been, rather, that you were notified early in the afternoon of June 10th of the admittance of Mr. Morin to the Physicians and Surgeons Hospital.

The testimony further shows that you were advised of what was done, that the wound was cleansed and that there was a bandage applied, a compression bandage, and the leg immobilized, splinted, X-rayed, and that he was taken to his room.

You at this time, as I understand it, have no personal recollection of that situation?

A. That is right.

Q. But, assuming that to have been the fact, that

(Testimony of Dr. John E. Leonard.)

you were thus notified and that his injuries were of the severity that you now know—a compound fracture of the lower third of the left tibia and a fracture of the back—were you in accord and are you in accord with the treatment that was given at that time?

A. Naturally my memory has been refreshed by Dr. Schneider talking to me and telling me he called me, and if he had not called me he would not have said so.

Q. Go ahead.

A. It is my own personal opinion that the treatment of this man at that time was very adequate and excellent. [304]

I would like to go just a step further and say that if I ever have a compound fracture and a broken back at the same time, I would not want any different treatment than was accorded in this case to this man.

Of course, I understand fractures sometimes are treated in different ways.

Q. Yes, fractures sometimes are treated in different ways, and there is a respectable segment of the medical profession who feel the wound must be closed within six to eight hours. Do you subscribe entirely to those views?

A. No, I don't. I think every case in an individual case and you must observe it and treat it accordingly. You must prepare yourself for certain things that might happen.

I think anybody who has had an injury like this

(Testimony of Dr. John E. Leonard.)

man sustained has had about all he should have in one day. I never have believed in this immediate setting of fractures.

However, that is my own personal opinion and I have seen lots of fractures, and it is my own personal opinion that would certainly add to his shock.

A man might be holding his own and be in pretty good shape, in better shape than you would really believe, but I have always felt—and again this is my own opinion over several years—that he is standing up pretty well under the present load and if you add a little more burden to it you could push him into shock, shock of different [305] degrees.

Also, I certainly do not subscribe to the reasoning that a fracture should be set immediately. I do not think that is necessary. That again is my own personal opinion.

Q. Do you believe that a respectable segment of the medical profession would look at it and does look at it the same way you do?

A. I think there will be men that will go along with my reasoning, yes. I think that is up to the individual.

Q. Who is the best judge, normally, of whether or not a person should be rushed to surgery, given a general anesthetic and the reduction made? Who normally is the man to make that choice?

A. The man on the job.

Q. I think the record in this case will bear out

(Testimony of Dr. John E. Leonard.)

the fact that this man probably was a hypersensitive person, which is nothing to his discredit.

Mr. John D. Ryan: I object to that, your Honor. There has been no testimony of that sort in the record at all.

Q. (By Mr. Harr): Are there hypersensitive people?

A. Certainly; people's tolerance to pain varies.

Q. Take two individuals with the same type of injury; one might tolerate it with no pain and another man might be affected seriously, is that [306] correct?

A. Yes; given two similar patients, one might have more complaints than the other; that is, complaints of more pain, if that is what you mean.

Q. If a person comes to a hospital, as Mr. Morin did, complaining severely of the pain in his back and in his leg, is that a circumstance that a doctor will take into consideration in determining what should be done with him?

A. Yes. He should make him comfortable and something should be given to allay his pain and make him comfortable, generally an opiate or some derivative.

Q. I think you have already stated you approve of the things Dr. Schneider had done?

A. Yes.

Q. Do you feel that the compression bandage and splint, after cleansing the wound, properly immobilized the leg?

A. Yes. I approve of it. I approve.

(Testimony of Dr. John E. Leonard.)

Q. That would have been your way of doing it, had you been there?

A. I would not have done it any differently.

Q. Having made the rounds of the hospital the morning of the 11th, was there any necessity, then, of changing the treatment that you found; the things that were done met with your approval?

A. No, sir; no necessity for changing the treatment that I found. [307]

Q. On the afternoon of the 11th I believe you talked, did you not, to Dr. Morrison and possibly to Dr. Craig about whether or not it would be safe and a satisfactory proceeding to transport Mr. Morin to the hospital in Seattle?

A. Dr. Morrison called me—my remembrance of the case—after I had examined him, and asked if I felt he could make the trip to Seattle and I said I felt in my opinion that he could be moved to Seattle.

Q. That was after the six- to eight-hour period that we have spoken of here?

A. Yes. That was the next day.

Q. With the type of bandage and splint, did you feel the leg was immobilized sufficiently for him to make the trip?

A. I did.

Q. Dr. Cherry yesterday testified that after Mr. Morin left the Seattle hospital he came back to Portland and that there was infection of the wound and they had made an incision up there. You were familiar with the record to that extent? They had made an incision and put in a sliding bone graft.

(Testimony of Dr. John E. Leonard.)

A. That was done in Seattle?

Q. That was done in Seattle. A. Yes.

Q. He returned to Portland about the middle of August and then in the latter part of August, August 26th, I believe, [308] Dr. Cherry, having stated there was infection in the wound, manipulated the wound to reduce a slight bowing. Would you have done that had that man come to you?

A. I would not.

Q. Why?

A. Not with the presence of an infection.

Q. Why?

A. As I understand it, to angulate a wound more than five degrees and manipulate it and rebreak a wound certainly does more trauma to it than the presence of an infection. I would not have done it. I have no quarrel with anybody but as for myself I would not have done it.

Q. Would that have a tendency to inflame and reactivate the infection, if there were an infection?

A. I would say yes.

Q. In January, January 22nd——

A. I am going on the assumption that there was an infection at the time.

Q. Yes. It has been testified by Dr. Cherry that there was osteomyelitis present in this wound in January, 1953, and that the man was complaining of pain from the Egger's plate; that he took him to the Providence Hospital and removed the plate and sutured the wound. He said the infection extended down to the bone and in the bone. Would

(Testimony of Dr. John E. Leonard.)

you have sutured the wound under those circumstances? [309]

A. We all do things differently.

Q. I am asking your opinion.

A. Personally, I would not. I would leave it open and pack it with vaseline.

Q. Why?

A. Well, it allows drainage and it allows healing from the bottom up. You are not making a full cavity out of it. I prefer to leave these wounds open.

Mr. Harr: You may inquire.

Cross-Examination

By Mr. Thomas H. Ryan:

Q. Considering a bone fracture of the lower third of the tibia—

Mr. Harr: I think I have one more question.

Mr. Thomas H. Ryan: Go ahead.

Direct Examination

(Continued)

By Mr. Harr:

Q. You are familiar with Campbell's "Operative Orthopedics," are you not? A. Yes.

Q. They, in that work, break these fractures down, compound fractures, into three groups. The first group consists of small puncture wounds, caused by a protrusion of bone from within out. That is Type 1. Type 2 refers to wounds extensive

(Testimony of Dr. John E. Leonard.)

in length and breadth. Would you consider this Type 1 or Type [310] 2? A. 1.

Mr. Harr: That is all.

The Court: Ask him to explain or state briefly what osteomyelitis is.

The Witness: A osteomyelitis is a bacterial infection that gains entrance into the bone either by direct infection or by hematogenous means.

Q. What do you mean by hematogenous?

A. Hematogenous, by the bloodstream.

Q. How would it come into the bloodstream?

A. It would have to get in in the site of infection where the abscess is, or infected material.

Also, it has been said osteomyelitis is developed where there have been septic tonsils. I have never seen that happen, but not too long ago I read of it. I would say osteomyelitis by the bloodstream is a possibility, but I don't think it happens too often.

The Court: In the old days we called it tuberculosis of the bone.

The Witness: Yes, sir. However, it has been found they are two separate things. They called it osteomyelitis, but it was tuberculosis, and vice versa.

The Court: It results in a sloughing of the bone?

The Witness: Yes. [311]

The Court: So that frequent operations sometimes are necessary?

The Witness: That is right, sir.

The Court: Necessary to keep ahead of it?

The Witness: Yes.

(Testimony of Dr. John E. Leonard.)

The Court: And sometimes a difficult question arises as to whether to amputate the whole limb.

The Witness: That is right. Of course, with the new antibiotics, which are not a cure of themselves but which certainly have been of wonderful help, we don't see those cases like we used to.

The Court: I tried a case about two or three years ago in Arizona where they hacked at a leg fifteen times and never caught up with it.

Q. (By Mr. Harr): Would infected tonsils be possibly a cause that would bring about this condition? A. Up here (indicating)?

Q. Yes.

A. They would come in the same category as tonsils would, yes, but those causes are rather remote. They are possibilities to us which I could not evaluate with any degree of accuracy. It is said, however, that those things do happen.

Q. Following the time Mr. Morin left Portland on June 12th, he went to Seattle and then there was a closed reduction or, rather, a reduction by manipulation and the wound closed, and [312] the record here shows that the wound was completely healed and that on July 11th, a little over a month from the time the accident happened, union not having taken place, there was another operation; there was an operation, an open reduction and a bone graft made and an Egger's plate applied. Is there danger in open operations?

A. Yes, there is. Any time you cut the skin anywhere there is danger. Even under the most ac-

(Testimony of Dr. John E. Leonard.)

cepted technique you are running a chance of having infection, whether operating on a bone or having an appendix out. There is always danger in a lesion, either traumatically or with a knife; under the most sterile conditions it can be infected.

To get back to this osteomyelitis in this case, the time element is certainly a factor to be considered. I certainly think we would have to stretch our imaginations pretty much to the breaking point to assume that what happened here in Portland was the cause of this osteomyelitis. Certainly the man in the Marine Hospital in Seattle would not have done an open operation, with a sliding bone graft, if there had been any infection at that time, any infection there. It just does not seem reasonable or plausible. It just does not seem at all plausible or practical. It does not even seem reasonable that all this would happen in an infected wound.

Q. All right. You find here that the wound had healed, [313] an open operation performed, a specimen taken, and the specimen microscopically examined, showing no infection.

Is that a further indication that there was no infection there? A. Yes.

Q. Then we find the man left the Marine Hospital against the advice of the doctors in attendance, and the record again shows no gross infection.

What is meant when we say "gross infection"?

A. Where it is very evident; you could look at the part infected and see.

Q. That is, visually?

(Testimony of Dr. John E. Leonard.)

A. Yes. You could see it.

Q. And you could not see it?

A. There is one thing I would like to make very clear, and that is I happened to hear some of Dr. Cherry's testimony yesterday, and I have no quarrel with him, and if that is the way he wants to do it, that is fine, but just because someone else chooses to do it a little differently does not make him incomparable.

I would like to illustrate that by something that pertains to the legal profession. My father was a lawyer and I know as a young man he took me down to John Cassidy's office. They were trying a case together, and the arguments they put up were terrific. I never heard how it turned out, [314] but, anyhow, it shows how you can have different opinions, and I think that a difference of opinion is healthy and is proper. I certainly welcome it.

Q. I want to ask you this question now: With reference to an operation in the lower third of the tibia, regardless of the care and attention given, infection can come into the wound, is that not correct? A. That is right.

Q. I am bringing this out for the reason that I think Dr. Cherry rather glibly says the records at Physicians and Surgeons Hospital in Portland are inadequate, and, therefore, the treatment was wrong, and he glosses over all of these circumstances that happened from that time on down and he says that because he had osteomyelitis the fault of it was

(Testimony of Dr. John E. Leonard.)

traceable to the first 40 hours of treatment in Portland, because they did not close the wound.

There was an operation in Seattle; that is one source of the osteomyelitis.

A. It could be one source, yes.

Q. Let me ask you this: He fell from a stretcher, out on the lawn, just before he left the Seattle hospital. The record shows that he denied it. They asked him about it, but he denied it, but his wife testified that he fell on the lawn—I think that is what she said. Could that have injured him sufficiently to have aroused the situation? [315]

A. There is a possibility, but not having examined the man—sometimes the amount of trauma is not necessarily indicative of the results. For instance, an old lady slips on a rug and breaks her hip and, while that is sometimes a mild trauma she may develop serious complications from it. On the other hand, there are times when people will have a very damaging injury and get out with little or no trouble.

Q. Then, further, if there were infection in the wound, as Dr. Cherry said, and he manipulated it and rebroke it to a certain extent to straighten out a slight angulation, is that a circumstance that could have been the cause of the osteomyelitis later on?

A. You are opening up a new avenue for the entrance of the infection. I am assuming that was the condition and certainly opening up new avenues for infection.

Mr. Thomas H. Ryan: It should be understood

(Testimony of Dr. John E. Leonard.)

that this was not an open reduction; it was a closed reduction.

Mr. Harr: That is true. It was a closed reduction. "Manipulation" is what I said, I believe.

Q. Is that an avenue of further trauma to the bone that could be the cause of osteomyelitis, a possible cause; put it that way?

A. You mean the manipulation of a closed reduction?

Q. Where there is infection.

A. Where there is infection in the wound at that time? [316]

Q. Yes. A. That is a possibility, yes.

Q. Could the osteomyelitis have come from the operation that Dr. Cherry performed at the time of taking out the plate?

A. Well, we can get infection any time that we open any wound or go back into it. There is always that danger. When we put screws into the bone, into the cortex, and do these other things, even in clean cases, so to speak, they are all possibilities.

Q. In connection with the operation performed by Dr. Cherry in removing the plate, attention was called to the fact that they sent a specimen and the pathologist came back with a report to the effect that there were fragments of bone, screws and a metal plate; there is no mention of any infection. Is that significant?

A. That is significant in the fact that what they sent to the laboratory was not infected, but that is all, just the tissue that they sent. They just ex-

(Testimony of Dr. John E. Leonard.)

amined what was sent to them, and the report states that as far as the examination shows, it shows no infection.

Q. Must we not assume that there was a microscopic examination of those segments?

A. I suppose there was, but even then——

Q. What reason would there be to send these specimens to [317] the pathologist?

A. Because in every hospital you are obliged to send specimens to the pathologist.

Q. We would not expect Dr. Cherry to send a specimen down with two screws and a metal plate just to have the pathologist tell him that that is what this specimen consisted of, just a metal plate and screws?

A. You would send them to your staff pathologist for identity. That is what he did there.

Q. For examination? A. That is right.

Mr. Harr: I think that is all.

Cross-Examination

By Mr. Thomas H. Ryan:

Q. Doctor, do you consider a compound fracture of this particular type a serious injury?

A. Yes.

Q. Do you consider it creates an emergency?

A. Well, it all depends on what you call an emergency and what you call a type of emergency treatment.

As I just got through saying, I think a fracture of that type—with a fracture of that type, although

(Testimony of Dr. John E. Leonard.)

the man seemed to be standing up quite well, he has had a lot of trouble, and my feeling is that it depends on the type of [318] wound and the length of the wound as to what you should do. I would think the first aid and cleansing the wound and applying the sterile dressing, the compression bandage and the immobilization would be what I would call emergency treatment.

Just as I said a while ago, there are some who feel that they should go right ahead and reduce it. I have no quarrel with those people, but you have to take your case as a whole and evaluate it and look ahead and anticipate what you may expect. You may be wrong in your anticipation, however.

Q. Isn't there other treatment, besides a superficial cleaning of the wound, short of reduction, that should be given?

A. What do you mean by that?

Q. Debriding the wound.

A. Debridement?

Q. And irrigating it internally.

A. You can get into a field of controversy there. There are different phases of this so-called debridement and different stages of it.

In a puncture wound I believe in irrigating it with saline. You can always cut the tissue out. Some people believe in a radical debridement where they take away the normal tissue. Others do a moderate debridement, oh, even [319] four or five or six days later. If necessary, you can go in and do a secondary. A puncture would, I think, should be irrigated

(Testimony of Dr. John E. Leonard.)

with a normal saline solution with a compression dressing and then splinted; a light irrigation inside and then it should be washed thoroughly on the outside.

Q. Don't you think it should be closed?

A. I do not. A wound an inch and a half or an inch long will heal by itself. I personally see no necessity of closing it, and the only thing closing will do is to make a finer scar. Besides, in closing it you are making it a closed cavity. You leave it open and the serous drainage and any blood that may come later will drain.

We know that these types of fractures swell and become edematous. I think it is a matter of opinion. I think a man is perfectly justified in his own mind in a case of this type not to close it.

Q. You are familiar with the "Pictorial Handbook of Fracture Treatment," are you?

A. No, I am not. I don't know anything about it.

Q. Do you want to take a look at it?

The Court: There is no point to that. He has not seen the book and he cannot take the time to read it now.

Q. (By Mr. Thomas H. Ryan): Do you agree with this statement:

"A compound fracture constitutes one of the most serious of all emergencies. The involved [320] bone is exposed through the skin and must be considered to be potentially infected. The need for prompt and adequate surgical care is as urgent as that for the treatment of acute appendicitis, a ruptured spleen

(Testimony of Dr. John E. Leonard.)

or perforation of a peptic ulcer. Delay in treatment of a compound fracture may result in infection, with osteomyelitis, septicemia, non-union, prolonged invalidism, loss of a limb or death.”

Do you agree with that statement?

A. I do not. I think that is up to your own individual opinion. You have to judge each case by itself. Just simply because a man does not go in and cut away a lot of normal tissue, and do this debridement—I think that is a matter of judgment that a fellow should decide for himself. After all, a man’s life is what he is figuring on, and I cannot agree with that entirely, because that takes in an over-all picture of compound fractures. I think all of these things have to be rationalized on an individual basis.

Q. You do not remember this case at all?

A. I only remember it by—I remember talking to Dr. Morrison and the chart shows that I saw him, and I certainly did. I looked over the chart.

Q. I am not saying you did not see him.

A. Well—— [321]

Q. You do not remember of your own memory now what happened?

A. No, I don’t, only what has been told me.

Q. You were afraid to go in and do surgery, that is what you think now, because of his condition?

A. You say I was afraid?

Q. Yes. A. I am not afraid of anything.

Q. I am not saying from the standpoint of personal fear. You say that you felt that his condition

(Testimony of Dr. John E. Leonard.)

was such that he could not stand surgery at this time?

A. What I said is in a case like this, a man comes in and I think the record and everything shows his blood pressure was holding up pretty well; there was no severe shock—but I have seen them go into shock within a quarter of an hour. I thought anybody who has had a compression fracture of the lumbar vertebra, knowing what would follow that, and has a compound fracture of the leg, I felt he needs conservative treatment and there is no hurry, as far as I am personally concerned, in going in and setting the leg and giving an anesthetic. You have to manipulate it; possibly you may have to plate it, and you could precipitate shock. That is a possibility and it could happen. I could see no reason for hurrying it.

I again state I am not an exponent of [322] immediate reduction of fractures in all cases. I have no quarrel with those who maintain that should be done, but I think each case should be based upon its own circumstances. It is my own feeling that at that time he had had enough for the time being, and that is the way I feel about it now.

Q. But you did not think he had had too much to stand a 200-mile trip to Seattle?

A. That was two days later.

Q. You feel a Yucca board splint is the proper type of splint to apply?

A. As far as I am concerned, yes.

(Testimony of Dr. John E. Leonard.)

Q. Do you agree with this statement from the same book:

“With rare exceptions, Yucca board or single splints (aluminum, wire, basket) of any kind should be used only in first aid or emergency procedures. This applies in war as well as in civilian practice. Yucca board splints are most unsatisfactory in the treatment of fractures of the long bones.”

A. That is his notion. I have used them a long time and have found, as far as I am concerned, they immobilize satisfactorily. If a doctor wants to use a stiff board or plaster or something else, that is all right, but I have used it.

Q. Do you agree with this:

“They do not fit the contour of the limb [323] accurately and can be applied only to one side of the limb. Motion between the fracture fragments, with displacement, occurs all too often.”

A. As far as I am concerned, in my own experience they have been satisfactory and, even in plaster, you can get motion between your fragments.

Mr. Thomas H. Ryan: I think that is all.

Mr. Harr: I think that is all.

(Witness excused.) [324]

BETTY ANN FREEMAN

produced as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Is it Miss Freeman or Mrs. Freeman?

A. Mrs. Freeman.

Q. Mrs. Freeman, you are a registered nurse?

A. Yes.

Q. Where did you take training?

A. Providence Hospital School of Nursing.

Q. When was that?

A. In 1947 I graduated.

Q. In 1952 were you regularly employed as a nurse in the Physicians and Surgeons Hospital?

A. At the time of this case I was doing vacation relief. I was employed for two weeks. I had previously worked in the emergency surgery two years.

Q. I beg your pardon?

A. I had previously worked in the emergency surgery for two years.

Q. Was that at Providence?

A. No, at Physicians and Surgeons; and I did vacation relief for the regular girls.

Q. On this occasion you were doing some relief at that [325] time? A. Yes.

Q. Would you look at Plaintiff's Exhibit No. 1, the last two pages, I believe? That is the record that you made showing Mr. Morin admitted to Room 115.

(Testimony of Betty Ann Freeman.)

After looking at the last page, the out-patient's record, that was made by you, was it not?

A. Yes, sir. That would indicate, "Morphine, 1/6 gr. for pain at 1:30; compression dressing to left lower leg; Abbocillin, 800,000 units; catheterized; specimen to laboratory, and X-rays."

Q. That was your record? A. Yes.

Q. Dr. Schneider, when he was on the stand, testified that he was right there and he rendered this emergency treatment, and he likewise testified that he irrigated the wound after having first administered a mild antiseptic and detergent to the bruised area and the abraded area of the wound; then he irrigated the wound and put on a compression dressing.

Mr. Thomas H. Ryan: There is no testimony he irrigated the wound. He said he gave it a superficial cleaning.

Mr. Harr: That is not my recollection.

The Court: Go ahead.

Q. (By Mr. Harr): That treatment does not appear in your notes as to what was done. Let me ask you this: In the light [326] of that testimony—were you in attendance there at all times?

A. No, sir.

Q. Why weren't you in attendance?

A. I was in and out of the emergency surgery. I had to get the morphine and I went to the pharmacist's for the penicillin. I had to go to the cupboard out in the hall for the splints and I took the

(Testimony of Betty Ann Freeman.)

specimen to the basement to the lab. I had to go to the office for the morphine.

Q. You said you had to go to the office for the morphine. Did they keep all the narcotics locked up?

A. Yes.

Q. Who has the key?

A. The nurses' supervisor.

Q. Do you have a personal recollection as to whether or not she was in the office when you went there?

A. No, I don't remember.

Q. If the supervisor is not in the office, you must run her down and find her?

A. Yes, that is right.

Q. She carries the key with her?

A. Yes.

Q. What about the penicillin, where is that kept?

A. That is in the pharmacy.

Q. You go to the pharmacy and it is given to you at that [327] particular time?

A. Yes.

Q. And it is issued to you?

A. Yes.

Q. Is it issued on your order or your request?

A. Yes.

Q. You mentioned a splint that you had to get.

A. Yes, had to get a splint.

Q. Do you have a personal recollection in this particular case of a splint being applied?

A. Not of it being applied, no. I remember going out—as I remember, I got two short wooden splints and gave them to Dr. Schneider.

Q. By "short," do you mean two or three feet in length?

A. (Indicating.)

Q. You took them to Dr. Schneider?

(Testimony of Betty Ann Freeman.)

A. Yes, sir; I did.

Q. Do you have any personal recollection of the type of bandage that was used, the dressing and bandage?

A. From reading my nurse's notes, yes.

Q. I will ask you if it is true that your nurse's notes show there were three packages of compression cotton?

A. Yes.

Q. And there were four three-inch and one six-inch bandages?

A. Yes. [328]

Q. Do you have any recollection, any personal recollection, of the size of the leg after it had been immobilized with the splint and bandages?

A. I believe so.

Q. Would you demonstrate to the Court what you recall?

A. (Indicating.)

Mr. Harr: You may inquire.

Mr. John D. Ryan: No questions.

(Witness excused.)

(Recess.) [329]

DR. WILLIAM R. KING

produced as a witness on behalf of the Defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. What is your full name?

A. William R. King.

Q. Where are you located, Dr. King?

A. At Seattle, Public Health Service Hospital.

(Testimony of Dr. William R. King.)

Q. We refer to it as the Marine Hospital, is that right? A. Yes.

Q. Where did you go to school?

A. I graduated from Tufts Medical College, 1948.

Q. From there tell us where you did your internship?

A. I interned at the Marine Hospital in Boston, Massachusetts, and then had active duty in the Coast Guard for six months, and then out-patient duty; then I was in Norfolk, Virginia, at the Marine Hospital there, and then was transferred to Seattle and started my surgical residency there in July, 1951.

Q. In 1952 were you a resident there?

A. Yes. I was the second resident. I was assigned to the orthopedic service.

Q. That is what you are preparing yourself for, surgery, generally, is that correct?

A. Yes. [330]

Q. Do you have a personal recollection of Mr. Amos Morin when he came to the hospital in Seattle?

A. Not when he came, but I did have him as a patient after the 1st of July.

Q. You have been handed Plaintiff's Exhibit No. 3. There has been a little confusion, I believe, in the evidence that has been presented thus far about the size of the wound. The testimony—of course, you heard it; you were here in the courtroom—was that there were lacerations, two of them, one about an

(Testimony of Dr. William R. King.)

inch and a half long and one about an inch. There is some evidence in this record that at the Seattle hospital one was of larger proportions.

Would you kindly refer to the record now and explain that?

A. In the physical examination given on admission it was stated there was a laceration approximately 12 cm. long and 4 cm. wide.

Q. In inches, how big would that be?

A. That would be five and a half inches long and a little less than two inches wide.

Q. I think the evidence shows also that there was blood incrustated over the area?

A. That is right. On Dr. Wagner's operative notes he said he removed the blood-encrusted dressings and splint and then the wound was one and a half inches long and another one inch [331] long.

Q. Is that the heading on Page 11 of the report where it says, "What Was Done," which reads:

"The region of the lacerations, one about one and one-half inches long and the other an inch long, was thoroughly scrubbed with soap and water, followed by a tincture of zepharin preparation."

A. That is correct. Where I took the size as being 12 cm. was taken from the physical examination as written by the intern. I think it should be noted that at the beginning of the physical examination the intern stated that, "The patient has a full body cast and leg cast." Therefore, at the time he wrote it he was not able to see the wound and describe it, so this description was not put there or

(Testimony of Dr. William R. King.)

observed at the time of surgery because he was not listed as being present at the time of closing the wound; apparently from what someone else had told him.

Q. Doctor, refer to Page 18-A of the record that you have before you. There is an entry there, dated July 5, 1952. Do you find that? A. Yes.

Q. Who made that entry? A. I did.

Q. What was that entry made from, your personal examination? [332] A. Yes.

Q. What does the entry state?

A. "Check wound; well healed; sutures removed; cast is loose and movement in fracture site; will have to recast."

Q. What did you mean when you said the wound was well healed?

A. The wound which was closed by Dr. Wagner had healed all right and the sutures could be removed.

Q. July 5th—Dr. Wagner made the original treatment and sutured the wound, is that what the record shows? A. That is correct.

Q. But there had been no open operation done as of that date? A. No.

Q. So the lacerations of one and a half inches and one inch are what you are referring to there?

A. Yes.

Q. They were well healed?

A. Yes, correct.

Q. Is there any indication from your notes or

(Testimony of Dr. William R. King.)

from the record anywhere that there was any infection at that time?

A. None at that time.

Q. How about the hospital chart as to fever or swelling or redness or tenderness? What does it show about that? [333]

A. At that time, if there was redness or swelling, I would have written it down. At that time I felt the wound was completely healed.

I can refer to the temperature curves. On Pages 27 and 28, running from June 26th through July 9th, his temperature was completely normal.

Q. Any significance about that?

A. Well, as far as we were concerned, it shows no evidence of infection.

Q. If there were infection, there would be a fever rise? A. There usually will be, yes.

Q. Had the wound become contaminated in Portland, Oregon, on June 10th, would you normally have expected some active infection by July 5th? A. I feel definitely that we would.

Q. Would you look on Page 19? I think there is a note there by Dr. Keever, July 24th. Who is Dr. Keever?

A. Dr. Keever started his internship on July 1st of last year.

Q. It says:

“Sutures removed this a.m. Wound appears to be infected and skin edges are not healing in the center of the wound.”

Is there any other evidence in the record, other

(Testimony of Dr. William R. King.)

than that, to indicate that there was infection? [334]

A. I have not noted any; in my discharge summary I stated that there was no evidence of gross infection at the time of discharge. The patient did have swelling following his open reduction and a separation of the wound edges and there was serous drainage, but there was no evidence of gross infection.

Q. Drainage, a layman's view means infection. Is that necessarily true?

A. No; an open wound will drain.

Q. What about sloughing? Could that also be said of sloughing?

A. Sloughing is dying tissue.

Q. That means there is actually a bacterial infection?

A. There is a certain amount of superficial infection in any open wound. There was no drainage of pus indicating a gross infection.

Q. When you say "gross infection," that means visually, what you can see? A. Yes.

Q. Your statement in your summary was that there was no gross infection, is that correct?

A. That is correct.

Q. You became fairly well acquainted with Mr. Morin during his stay there? A. Yes. [335]

Q. Would you tell us a little about him? I mean, what kind of a patient was he? Distinguish him from different types of patients, if you can, and state it briefly.

A. I think, as evidenced by the record, he was

(Testimony of Dr. William R. King.)

a difficult patient to control, what we consider to be a low-threshold-pain type and, therefore, needed considerable medication, and he had to have the cast cut following his operative procedure because he could not tolerate the pain that he had.

Q. Please run through the nurse's notes rapidly and tell us generally what those complaints were as to pain.

A. "Patient restless; complaining of severe pain in leg" at one point.

Q. Cover it by dates, if you can.

A. He was admitted on the 12th, at which time he was difficult to arouse. He returned from surgery at 8:30—9:30, "Patient very restless at intervals; was given sedatives for extreme restlessness; was twisting and turning in bed; calling aloud and took only sips of water."

On the 13th he was moaning at frequent intervals and had a poor day; patient very confused, turning from side to side.

On the 14th he was given Demerol for pain. "Awake; moaning; twisting and changing positions constantly when awake. Complains of pain in back and side."

Demerol was given at 5:15 and the notes say: "Poor [336] night."

Q. At 3:10 in the morning do the notes show he had pain, that there was extreme restlessness and he was crying with pain? Do you see that?

A. Yes. "Complains continually of pain, mostly

(Testimony of Dr. William R. King.)

the back; taking fluids better today." That was on the 14th at 9:00 a.m.

At 4:00 p.m. he was given Demerol for pain and restlessness.

On the 15th at 5:00 a.m.: "Crying with pain—restless."

The Court: I can read all that, Mr. Harr. He doesn't need to read it into the record.

Q. (By Mr. Harr): Doctor, what I was getting at is this: Patients differ, do they not? One can tolerate pain and another might not? A. Yes.

Q. Do you feel that this patient was of one type or the other?

A. I felt he required more sedation and medication.

Q. You remember Mr. Morin telling us about your talking with him about cutting his leg off?

A. Yes.

Q. Would you tell us about that?

A. I have no recollection of saying that to him. I won't [337] deny it, but he more or less quoted what I said as, "If you don't straighten out, I am going to have to cut it off." Whether that would be referring to the leg cast or something else, I don't know, but he was under narcotics most of the time there and we had difficulty in controlling him, and I might have said something like that.

Q. But at any time did you have any idea in the world of amputating the limb?

A. No. We felt he was coming along well.

Q. But because of his sensitiveness to pain he

(Testimony of Dr. William R. King.)

was a lot harder to take care of? A. Yes.

Q. Anywhere in the report is there any evidence that there was any infection?

A. No. The intern had made a note that the wound "appears to be infected," but we did not feel it was.

Mr. Harr: You may inquire.

Cross-Examination

By Mr. John D. Ryan:

Q. With regard to the narrative summary, you made that after the patient had been in the hospital, after discharge? A. Yes.

Q. You did not actually examine Mr. Morin when he came in the hospital? [338]

A. No, I did not.

Q. The question of threshold pain, it would take some observation to realize Mr. Morin did have threshold pain, as it is referred to?

A. Well, yes, but after the second operation I had charge of him then and had to cut down on his medication.

Q. Is there any doubt in your mind that during that period he was in actual pain?

A. I know he had pain, yes.

Q. An injury of this kind is accompanied by severe pain? A. Yes, sir.

Q. Is it true, Doctor, when a section is localized in the lower leg, or some part of the body, a rise in temperature is not always present?

A. That is true, but if the infection becomes at

(Testimony of Dr. William R. King.)

all deep then the temperature response would be noted.

Q. When did you first see the patient personally?

A. I would say probably on July 1st. My first note is made on July 5th.

Q. If you want to consult your notes, go ahead, but I have no further questions.

A. That is right. My first note was on the 5th, but I went on that service on the 1st of July.

Mr. John D. Ryan: No further questions. [339]

Redirect Examination

By Mr. Harr:

Q. I think Dr. Cherry yesterday said something about the fact that he was in a coma when admitted. Do you distinguish between that and being rather heavily sedated?

A. That is a difficult thing to distinguish. I think it is stated here, "Semi-comatose, hard to arouse."

Mr. Harr: I think that is all.

Mr. John D. Ryan: I have no further questions.

(Witness excused.) [340]

DR. PAUL WALKER

produced as a witness on behalf of Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. What is your full name?

A. Paul Walker.

Q. You are with the U. S. Public Health Service Hospital in Seattle, Washington, are you not?

A. Yes, I am.

Q. Dr. Walker, will you state for the record where you graduated, where you took your medical education and where you interned and had your residency, and so forth?

A. Yes. I graduated from the University of Tennessee, College of Medicine, in 1931. I interned in the Baptist Memorial Hospital for 18 months in Memphis, Tennessee.

Q. You interned where?

A. Baptist Memorial Hospital.

Q. In Tennessee?

A. Yes, in Memphis. I had three years' residency training in surgery in New Orleans, Louisiana in the Marine Hospital. I had post-graduate training anatomy and pathology at the University of Maryland.

The Court: That is the school in——

The Witness: Baltimore. I was certified by the American [341] Board of General Surgery at Johns Hopkins in Baltimore in 1938.

(Testimony of Dr. Paul Walker.)

Q. (By Mr. Harr): Your specialty is general surgery?

A. General surgery, and I am Chief of the surgical service at Seattle.

Q. You are at the present time a consultant in surgery to the Washington Medical School, the University of Washington Medical School?

A. Yes, I am.

Q. How long have you been associated with the United States Public Health Service?

A. Since 1934.

Q. In the capacity of general surgeon, is that correct?

A. Well, I have been chief of that service since 1938; chief of surgery in Seattle and in various hospitals, Mobile, Louisville, on Navy transports during the war, and so on.

Q. You are presently in Seattle as Chief Surgical and Medical Director? A. Yes.

Q. Of the U. S. Marine Hospital there?

A. Yes, I am.

Q. You have been handed Plaintiff's Exhibit No. 3. Doctor, you have examined that record?

A. Yes.

Q. Since this case was filed? [342] A. Yes.

Q. And you are familiar with it? A. Yes.

Q. Would you refer to the record and advise the Court what part you played in the treatment of Mr. Morin as he went through that hospital?

A. Of course, I am in general supervision of the entire service. The way the service is set up, I have

(Testimony of Dr. Paul Walker.)

a deputy chief and two assistant chiefs, one of whom, the deputy chief, is my right-hand man, and my assistant chief, one of them, is in charge of orthopedics, and the other one is in charge of neurological cases. I make the rounds at periodic intervals and supervise these people, but they are qualified men under my supervision, four qualified men under my supervision.

Q. When you say "four qualified men"—

A. That means they have completed their residency in surgery, four to five years, and they have had from one to two years' experience under Board-qualified men, or Board men.

Q. What do you mean by "Board men"?

A. The Board is a group of surgeons who examine you to determine whether or not you are a qualified general surgeon. They are practicing in all specialties.

Q. This Board, is that a national organization?

A. Yes, it is an incorporated Board.

Q. You have been a member of the Board a great number of [343] years? A. Since 1938.

Q. Will you tell the Court what you know about this case and what you did?

A. Well, this man was admitted on June 12th to the hospital there, and I recall Dr. Wagner consulting me about this case. I am not positive that I saw him or not, but I did advise that he go ahead and do the debridement and reduction of the fracture, which was done, and the leg healed very nicely, and on the fourth operative day his temperature was

(Testimony of Dr. Paul Walker.)

normal. We rely very heavily on temperature to determine, to tell us whether or not there is infection present in the bone. We cannot see it any other way sometimes.

The sutures were removed on the tenth or eleventh day, I don't recall exactly which. At that time the wound was clean.

Five days later, the wound still being clean, we did a sliding bone graft and put in an Egger's plate, Egger's bone plate, to hold the bones in apposition. The reason we did this was because this was an oblique fracture; although it was not an acute oblique fracture—it was an obtuse oblique—sometimes those will heal by manipulation, but in his particular case it slipped and became displaced again, and we thought it was necessary to hold it in apposition, because this fracture of the leg had not united at the junction [344] of the middle and lower third.

Q. Why?

A. Because of the absence of nutrition existing in the lower end of the tibia at that point, and this frequently occurs, and nutrition of the bone is insufficient to carry on healing in a difficult fracture.

It had been a month, approximately, or three weeks at least, since the original injury, and since we had to do an open reduction and bring the bones, the bone ends, into apposition, and since the incidence of non-union is so high in such cases, we thought it was advisable to use a sliding bone graft to promote healing at the same time, which we did.

(Testimony of Dr. Paul Walker.)

Post-operatively, again, his temperature had run about normal—I should say, returned to normal within four or five days. It never had elevated to more than 99.2, which was unusual. They frequently do.

Q. Going back one step, Doctor, when you operated on him you said the wound was clean and well healed? A. Yes.

Q. You performed the operation, did you not?

A. Yes, sir; I did.

Q. At your direction there was a specimen taken? A. Yes, there was.

Q. Of a bony fragment or two? [345]

A. Yes.

Q. Those were sent to the pathologist?

A. Yes.

Q. Plaintiff's Exhibit No. 3 does have the pathologist's report? A. Yes, sir.

Q. Does the pathologist's report indicate that there was infection at that time in the wound?

A. This is the pathologist's report on the tissues submitted, bone chips in surgery. This was signed by Dr. Charles Keever who was the intern on the case. This was dated July 11, 1942, and on the 17th it states:

“Section reveals some bone of the bone chips which is definitely dead. There is some partially viable cortical bone and in some areas new bone is being laid down on top of dead bone. The larger piece of tissue representing callus shows some scar

(Testimony of Dr. Paul Walker.)

tissue. At one side of this tissue osteoid is being laid down. Cellular infiltration is at a minimum," and the impression of the pathologist is:

"Viable and necrotic bone fragments and callus from fracture site of tibia,"

and then in parenthesis: "Mal-union."

That is signed by the Associate Professor of [346] Pathology at the University of Washington Medical School, who is also the Chief Pathologist at the hospital. He is a Board man.

Q. You have discussed this case with him?

A. I took the tissue down to him after the case came up and asked him to review it, and he said there was no evidence of osteomyelitis in the tissue submitted.

Q. Would you go ahead and tell us about the significance of the temperature chart, what effect fever, for instance, might have and what it meant to you? Continue on, please.

A. Observation of the temperature curve is general. We look at the temperature curve, and if the temperature curve stays down, we don't disturb the wound, because it is a very good indication no infection is present. Any infection, in any degree whatsoever, will give you a temperature rise.

Q. Was there any significant temperature rise?

A. There was no significant temperature rise in this man throughout his hospital stay after the first four days or five days from the first operation and about four days from the second.

Q. Is there anything else in the report that you

(Testimony of Dr. Paul Walker.)

have there that you would like to comment on to the Court pertaining to this man's condition?

A. Well, I might go on to state that I have a note in my operative report, among other things, that this fracture could [347] not be closed or could not be retained by closed methods and, inasmuch as it had been three weeks since the original reduction of a compound fracture, it was decided that an open reduction with a bone graft would insure the most favorable conditions for union. The report states: "There was very slight callus present at the fracture site."

The skin was closed with a running lock stitch of dermal without difficulty. The extremity was put up in a plaster of Paris cast. There had also been a compression fracture of the second lumbar vertebra and the patient was placed in extension on a Roger Anderson table, which is an orthopedic table designed by Dr. Roger Anderson of Seattle.

Subsequently, at the time we removed the sutures there was considerable tension in the wound in the leg because the skin around the lower leg is scarce, and any swelling causes a considerable amount of tension in the skin and post-operative edema and swelling would cause some tension on the sutures, and with the spreading of the wound there was serous, which means just a fluid-like drainage from the wound and, according to one intern's report, there was some sloughing of the edges of the skin.

Q. Does that mean, Doctor, that there is actually infection present?

(Testimony of Dr. Paul Walker.)

A. No, sir; because whenever there is granulation tissue you always have serous drainage. [348]

Q. Granulation tissue, is that healing from the bottom up?

A. Yes, that is healing by secondary process; to heal skin to skin, that is primary. If it is healed by granulation tissue, that is secondary.

Q. Do you feel that the wound did heal satisfactorily after the operation you performed?

A. Well, yes.

Q. It was healing slowly, is that it?

A. Yes, we would like to have seen it heal more rapidly, but it was apparently doing satisfactorily when he left there because the temperature curve was normal and there was no evidence of infection.

Q. You think that is definite and positive, that there was no infection present or the fever chart would have risen? A. Yes.

Q. Go ahead, please.

A. I feel very definitely that there was no infection because of the lack of a rise in temperature.

Q. Mr. Morin left, of course, by his own choosing. Did that have the blessing of yourself and your staff that he should leave at that time?

A. No. There is a note in the chart that covers that. I don't know whether I ever talked to this patient before he left or not. I generally do, where a patient is apparently dissatisfied and wants to leave against medical advice, I try [349] to go down and tell him what the possibilities are, what he might

(Testimony of Dr. Paul Walker.)

expect, and try to urge him to stay on for a while for his own betterment, but whether I did that in Mr. Morin's case I don't know.

The Court: How many patients do you have?

The Witness: On the surgical service we have anywhere from 130 to 165 patients, and we have 1500 out-patients a month. There are nine of us—eight of us.

Q. (By Mr. Harr): You have been in the courtroom during the entire trial, Doctor, and you remember Mr. Morin testified that he just did not feel he was getting anywhere, I suppose on account of being away from home in Portland.

A. Well, I don't remember exactly about this particular case, but I believe it is covered by a note in the record, if you would like for me to read it.

Q. Doctor, I think that is perhaps taking up time. He did, however, make one significant statement, I thought. He said he thought he should leave there and get himself an orthopedist.

A. During the trial he said that, yes.

Q. I would like to have your views on that. That apparently is Dr. Cherry's view. Dr. Cherry, you remember, yesterday said some of these people undertake to treat patients when they don't know what they are doing, and made some other rather unkind remarks, and they should go to an orthopedic [350] specialist. What about that? I would like to have your views on that. Just tell us how you feel about that.

(Testimony of Dr. Paul Walker.)

A. Well, I don't agree with Dr. Cherry on that at all, and I could site you many teaching hospitals which do not have orthopedists running their fracture services. They have a general surgical service, and the orthopedic service is entirely separate. You call in an orthopedist when you have some complicated thing that they are familiar with, crippled children and crippled adults. In most communities, orthopedists are too busy to come out and fool with a fracture, and sometimes we can't get them out there. I realize, however, many general surgeons have made great contributions to the treatment of fractures in the past.

Q. You heard Dr. Leonard testify, and, without going over his testimony step by step, are you pretty much in accord with what he said?

A. You mean about——

Q. About the type of treatment.

A. Individual treatment of patients?

Q. Yes.

A. Certainly, every patient is a different individual.

Q. Well, would you go along with this, Doctor: A man comes in who is in extreme pain, with a fracture of the back, with a possibility of developing into an ileus, and a fractured leg. Is it not usual to accept the judgment of a good competent [351] doctor in attendance who can see him at first hand?

A. Yes, he would have to.

Q. He may be wrong; you concede sometimes

(Testimony of Dr. Paul Walker.)

that would be the case? A. Yes.

Q. But is that something that the general medical profession would, in your opinion, concede, that in these situations each case must be dealt with individually and left to the judgment of those who have seen him and know what his condition is at that time?

A. Yes, if they have competent backgrounds and have competent reasons for their judgment, yes.

Q. I think you have told me that where a man's general condition permits you would like to take him to surgery within six to eight or ten hours?

A. Yes.

Q. The sooner the better?

A. Although that deadline of six hours is pretty arbitrary, a pretty arbitrary deadline. Antibiotics have done wonderful things for surgery in general and fractures in general, as well. I cannot say arbitrarily six hours or five hours, or say that within five or six hours you are not going to get an infection and in six hours and one minute you are. Antibiotics have changed all that. You can see it evident in this particular case. [352]

Q. Would you have performed this operation with a bone graft and a plate if you had any idea that there was any infection?

A. No, sir; I would not. I would not perform a bone graft in the presence of infection; no, sir.

Q. I understand when Mr. Morin came down from Seattle that there was some slight angulation to the bone. I believe it will be shown it was five

(Testimony of Dr. Paul Walker.)

degrees; I think there is testimony on that, about it being about five degrees. A. Yes.

Q. Is that a poor result?

A. No, sir; that is not. Five degrees is not very much angulation. It would probably contribute very little additional difficulty, if any.

Q. If that wound were open and infected, as Dr. Cherry said, would it, in your opinion, have been good practice to manipulate that wound?

A. No, sir; I would not have manipulated it with that degree of angulation. One reason I would not have manipulated it is because if he already had an infection he was certainly asking for trouble by manipulating it under a general anesthesia, and it must have been quite a manipulation, because apparently considerable force was used. It had only been two months from the operation, from the time of the operation. There was definite callus [353] present.

Q. If there was infection in there, would it not activate it? A. It might, yes.

Q. If you were the doctor in attendance and it became necessary to remove the Egger's plate, and the wound was infected, and the infection extended down to the bone, and you removed the plate and screws, would you have sewn up the wound?

A. In that respect, I would be guided by the condition of the skin. If there was actual infection present, if the skin was thin and damaged, it would not hold the sutures anyway. If there was actually bone present and if there was an actual sequestra-

(Testimony of Dr. Paul Walker.)

tion of bone, I would have removed the sequestrum and left the wound open, and then got back at a subsequent date and done a skin graft.

Q. You heard how Dr. Cherry told about the operation, that he removed the plate after he had made the incision, and that he took out a small amount of pus, he said. Could that have been the cause of the sequestrum, the dead bone?

A. Dead bone is sequestrum. He had no culture done. He didn't really know whether it was infected or whether it was dead bone. Pus can be sterile; it can be infected pus. It does not have to have organisms in it to have pus, you know.

Q. Is that what you call a bony necrosis?

A. Necrosis means death. [354]

Q. I think Dr. Cherry testified that because of the fracture and the fact that it was reduced impaired circulation. Dr. Cherry said there was no circulation in the thigh, I think he said, and in the ankle.

Do you feel that a delay of, we will say, 40 hours in reducing the fracture would be the direct cause for reduction of circulation at that point? .

A. I am not sure I understand your question.

Q. Dr. Cherry testified that because the fracture was not reduced that impaired circulation.

Mr. Thomas H. Ryan: The testimony was that the fracture was not cleaned. He did not say "reduced." That problem didn't come up. It was reduced later.

Q. (By Mr. Harr): He said early reduction

(Testimony of Dr. Paul Walker.)

would have prevented a failure of circulation in that area and damage to the circulation.

A. I believe he testified the man had adequate circulation in his ankles and he had adequate circulation in his thigh. There is only one blood vessel, one major blood vessel, that goes to the leg and that is the—if he had no circulation in his ankles, he had no circulation elsewhere, as far as efficient circulation around the fracture site was concerned. I would assume in this case he probably had increased local circulation if, as he states, he had infection.

Q. You have heard all the testimony thus far and you have [355] studied the history of this case, Doctor. Do you think it can be said, fairly and honestly, now, that the man's osteomyelitis resulted from this condition seven months before the osteomyelitis developed?

A. I do not think anybody could accurately determine when his osteomyelitis developed. He had originally an open wound; he had a secondary closure in Seattle; he had a third operation or a second operation with a bone graft and a bone plate; he had a manipulation. Any of those things could have caused his osteomyelitis.

The Court: How many other witnesses do you have?

Mr. Harr: I have just Dr. Hunter, Dr. Berg and Dr. Morrison.

(Recess until 1:30 p.m.) [356]

(Testimony of Dr. Paul Walker.)

(Court reconvened at 1:30 o'clock p.m., Friday, July 23, 1954, pursuant to recess.)

Direct Examination
(Continued)

By Mr. Harr:

Q. Doctor, I think I have to ask you one or two more questions. The plaintiff in this case, as you heard, was injured on June 10, 1952, and was able to return to work about the 8th or 9th of December of the same year, which would be a period of about six months.

Could you express a comparison of his case, his injuries, with the injuries of a similar nature that you have had in your experience? How does his case compare as far as being able to go back to work in that length of time; how does it compare with others that you have had in your experience?

A. Most textbooks will tell you that they can go back to work in about four to six months. Actually, in my experience, it takes considerably longer, an average of about eight months and the maximum generally is about twelve months before they are able to return to work.

Q. Are you also considering an injury along with the compound fracture, also a fracture of the back?

A. I was not considering the fracture of the back in that, no. The time for a fractured back is generally eight to twelve [357] months, but with

(Testimony of Dr. Paul Walker.)

multiple injuries it might prolong his return. Bone heals generally within six months or so; sometimes it does not; sometimes there is associated with an injury trauma to the muscles and prolonged immobilization of the joint, and the patient is just not able to walk without a cast and go back to work. It takes time for him to rehabilitate himself and build up his strength and increase his joint motion.

Q. One more question along that line: There has been some little comment made thus far as to economy. It has been suggested or at least inferred that economy was the only reason for this treatment not having been given in Portland, the man being sent to Seattle, that economy was the only reason. What has been your experience in the years you have been with the Public Health Service, in Seattle, I think you said, and New Orleans and elsewhere, with reference to economy in treating a patient? Just give us your general view of that.

A. Well, it is quite true the Public Health Service treats its patients cheaper than any of the other service hospitals—I am talking about the armed services or the Veterans Administration—but at the same time I believe our equipment and our service to patients is as good as any of these services, or any other place. If I did not feel that way, I would not stay in the service; they don't pay me [358] enough money; they have to give me good equipment and good things to work with for the patients' care.

Q. And you did have good equipment and a good staff in Seattle, did you not?

(Testimony of Dr. Paul Walker.)

A. We have an excellent staff and we have excellent equipment, yes.

Q. You made a statement to me which impressed me about the matter of a patient complaining of pain when in a cast. Tell the Court just what you told me about that.

A. If a patient tells me he is having pain, I talk to him and look him over and see if there is any cause for his pain. If there is any question in my mind, I will take the cast off, rather than have him suffer or complain unduly. There may be something in the cast I can't see from an external inspection, so I will bi-valve his cast and look at it and inspect it and see. I do that to protect the patient, because you are not always right; the patient sometimes is right, certainly.

Q. But when it comes down to the question of economy——

A. Economy has nothing to do with it.

Q. Have you ever heard of them practicing economy at the expense of the patient's health and welfare?

A. Economy has nothing to do with it at all; no, sir.

Mr. Harr: You may inquire.

Mr. John D. Ryan: No inquiry. [359]

The Court: That is all.

(Witness excused.)

DR. ALBERT T. MORRISON

produced as a witness on behalf of the Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Your full name, Doctor?

A. Albert T. Morrison.

Q. You are with the Public Health Service?

A. Yes.

Q. You are in charge in Portland, Oregon, at this time, and have been for some time past?

A. Yes.

Mr. Thomas H. Ryan: Talk a little louder, please.

Q. (By Mr. Harr): Would you state for the record where you got your training, what schools you attended and where you interned, and generally what your educational qualifications are?

A. I finished the University of Oregon Medical School and interned in Multnomah County Hospital in Portland; then I went into the Public Health Service and spent about twenty [360] years total in hospital work. I finished school in 1922, so I have had about 32 years——

Q. 32 years' practice? A. Yes.

Q. During that 32 years have you been with the U. S. Public Health Service all that time?

A. Nearly 30 years.

Q. At the present time you are in charge of the patients here in Portland, patients of the Public

(Testimony of Dr. Albert T. Morrison.)

Health Service? A. Yes.

Q. Were you employed in a similar capacity in June of 1952? A. Yes.

Q. As I understand it, you did not go to the hospital or treat the plaintiff in this case, Amos Morin? A. No.

Q. You did not see him until later when he got out of the hospital in Seattle, is that right?

A. Yes.

Q. Do you recall discussing the case with Dr. Craig and Dr. Leonard and determining that the case was one that should properly be sent to Seattle?

A. Yes.

Q. Will you tell us about that.

A. Well, as soon as I heard that this patient was in the hospital, we were quite aware of the serious nature of his [361] injuries and we made sure that Dr. Leonard was on call and had taken over the case.

Then, the next day, we got the report of the case from Dr. Craig and in the afternoon reached Dr. Leonard by telephone and inquired what he thought of the case, and it was our opinion, between the three of us, that with the multiple injuries and probably prolonged treatment required, he would be better off if he were in the Seattle hospital to begin with, and since the immediate emergency was over and that he would not be operated on any sooner in the Physicians and Surgeons, and that the trip to Seattle was not considered to be hazardous in

(Testimony of Dr. Albert T. Morrison.)

any way, we determined that we would transfer him to Seattle.

Q. I notice in one of the reports that was made, I think over your signature, it was indicated that the reason he was being transferred was for reasons of economy. Tell me, did you write that report?

A. No, the doctor who had charge of the case prepares the transfer papers and the abstract of the record and presents it to me and I sign it.

Q. Do you have any remarks to make as to why that comment was made?

A. Yes, I think that I should comment. This procedure of transferring patients to Seattle is routine for many ambulance patients and for surgical cases where they are convalescing [362] post-operatively and are able to make the trip, not for reasons of economy in the first place but because they have better facilities in Seattle than in most general hospitals for looking after such patients, and they have a fine physiotherapy department there which is important in rehabilitating any fracture case.

Of course, you may say that economy enters into these routine transfers. We have orders that that shall be done, but in this particular case this was not regarded as a case in which economy entered into it whatsoever.

Dr. Craig prepared the papers and, somehow or another, got this statement in there. It was late in the day when I received it; the clerks had gone home; so I was rather taken back to see that on the

(Testimony of Dr. Albert T. Morrison.)

papers, but, since it was difficult to get it rewritten, I simply signed it and put it through, although it was contrary to the facts. There was no idea of economy in this transfer whatsoever. It was simply that the welfare of the patient would be enhanced if he were sent to Seattle.

Q. Have you ever considered economy when the welfare of the patient is to be considered?

A. No, there is no reason why we should, in the Public Health Service.

Q. Of course, in the outlay of public funds and appropriations, that does necessitate that you be economical if you [363] can.

A. The system that the Public Health Service has for hospitalization—they have a number of large hospitals very well equipped and very well staffed at central locations around the country, and then in the other cities in the neighboring states they have found it best to have clinics located, and they are supposed to make these transfers of any suitable cases to the hospital, the Public Health Service hospital. That has been the policy for many years, and we have found that it works out all right.

Mr. Harr: You may inquire.

Cross-Examination

By Mr. John D. Ryan:

Q. When did you first learn Amos Morin was injured and was at the hospital?

A. They called the clinic where Dr. Craig is located shortly after he arrived there.

(Testimony of Dr. Albert T. Morrison.)

Q. The Physicians and Surgeons Hospital on June 10th did that, on the day he was brought into the hospital? A. Yes.

Q. Were you informed at the same time?

A. Yes.

Q. Were you told what his injuries were?

A. Yes. [364]

Q. Is Dr. Kimberley a consultant of your service in Portland, Oregon? A. Yes.

Q. Is Dr. Kimberley an orthopedist?

A. Yes.

Mr. John D. Ryan: That is all.

Redirect Examination

By Mr. Harr:

Q. Do you know whether or not Dr. Kimberley was a consultant at that time?

A. Oh, yes; he has been a consultant for quite a number of years.

Mr. Harr: That is all.

(Witness excused.) [365]

DR. WARREN C. HUNTER

produced as a witness on behalf of Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. You are Dr. Warren C. Hunter?

A. Yes.

(Testimony of Dr. Warren C. Hunter.)

Q. Will you state generally your education, your schooling and qualifications?

A. Well, I was graduated from the University of Oregon Medical School——

Mr. Thomas H. Ryan: We will admit the doctor's qualifications.

A. (Continuing): ——I received my degree of Doctor of Medicine in 1924. Prior to that time I had been a student instructor in pathology.

After a year's internship, I went into pathology as a specialty and have continued in that ever since.

Two years later, 1927, I spent one year at the University of Michigan in graduate work and for a Master's degree in pathology. From there, then I returned to Portland and have been engaged in consultative practice and teaching pathology in the Medical School ever since. I have been head of the Department of Pathology since 1944.

Q. I will ask you whether or not you did not, at the request [366] of Dr. Morrison of the U. S. Public Health Service, examine a specimen of tissue and bone fragments?

A. I examined a slide with some microscopic sections on it, stained sections, at his request, yes.

Q. You have been shown Defendant's Exhibit No. 17. I will ask you if that contains the specimen that you examined?

A. It bears the same number, S-52-1702, Amos Morin. This slide has on it some number of microscopic sections that my report indicates I saw. The

(Testimony of Dr. Warren C. Hunter.)

chief identification, of course, is the number, S-52-1702, and the name "Amos Morin."

Q. Did you make a report of your findings and conclusions after having made a microscopic examination of that exhibit? A. Yes, I did.

Q. Would you tell the Court what your findings were?

A. This report was dated April 13, 1954. In addition to the number and the name and Dr. Morrison's name, there is a brief description of the slide saying that it has five sections on it, what they have been stained with, and so forth.

The examination, microscopically, indicates that four of these tissues on the slide are bone, each with a very little marrow along with it, and in neither one of them could I see inflammation or necrosis or a breakdown either of the bone or marrow.

The fifth and much the largest of the pieces [367] of tissue was not made up much of bone; it consisted mostly of connective tissue and fat although at one edge of it there was a little callus, which is evidence of healing bone, and some young trabeculated bone, a little bit of bone which was surrounded by or imbedded in the connective tissue.

This little bit of buried bone I did not feel was broken down or necrotic, but its position made me think that it might represent a tiny sequestrum from the fracture site—a sequestrum, as it is called, or a little cast-off piece from the fracture site.

There were few leukocytes, or wandering cells, present. They were of two kinds, what we call monocytes and, the other, lymphocytes, foreign-body

(Testimony of Dr. Warren C. Hunter.)

types of cells which are likely to surround any inanimate matter that cannot be discharged, all of these lying in the connective tissue, but these were the only evidences of inflammation existing at all in any of the tissues that are on this slide.

Some of this connective tissue showed evidence of having been recently formed. At one point a few skeletal muscle fibers had become incorporated in the connective tissue.

The question that was asked of me by Dr. Morrison was whether in my opinion there was evidence of infection in this tissue, and my answer was no; there was but little inflammation [368] at all and this is not the type of reaction that one would expect to an infectious agent; that is, some form of bacteria.

Q. Doctor, it has been testified that these specimens were taken deep in the incision that was made, where there was a sliding bone graft and an open reduction of the fracture, with a metal plate applied.

A. Well, Dr. Morrison told me, when he delivered this microscopic section to me personally—he told me that these tissues had come from the site of a compound fracture to a lower extremity some little time after the fracture occurred, and that these were removed at the time of an open reduction of the fracture.

Q. So, if there was infection there, you would have expected it to show up in this specimen, would you not?

A. Yes, if the specimens had been properly taken

(Testimony of Dr. Warren C. Hunter.)

in sufficient number, and they seemed to be; there were five of them.

Q. Osteomyelitis, of course, is an infection, is it not?

A. It is an infection of the marrow of the bone.

Q. You, of course, found no evidence of osteomyelitis being present in these bone fragments?

A. No, I didn't.

Q. There is a practice, of course, in hospitals to make a submission of tissues, to submit tissues to the laboratory, [369] when operations are made. Is that not correct?

A. It is almost universally done, yes.

Q. What is the purpose of them taking these specimens?

A. It has more than one purpose. One purpose is simply identification, to better the practice of medicine, to see whether another doctor can identify the tissue that is purported to have been removed. That is among the purposes, as an exact diagnosis is most important, the most important purpose of all in submitting material of that kind, to submit anything that you remove operatively to the pathologist, whose business it is to know what is abnormal, and he asks anyone to consult with him and ask his opinion: "What is it? What is wrong with it?" and that is an independently rendered opinion by another person, who then makes a written report and concludes his report by what is known as a pathological diagnosis as distinguished, for example, from a clinical diagnosis.

(Testimony of Dr. Warren C. Hunter.)

Q. Doctor, we are here dealing with a patient who, in addition to a fracture of his back, sustained a rather bad compound fracture of his left tibia, the lower third. It appears that sometime later, perhaps six or seven months after the accident occurred, osteomyelitis developed.

Would you advise us the most common source of osteomyelitis infections?

A. Well, in a compound fracture, by which we mean a fracture [370] in which some portion of the broken ends of bone actually protrude through the soft tissues and through the skin to reach the surface where they can be seen to produce a wound, in such a fracture, any such a fracture, I should say, has possible infection in it and, since then that might be an infection of the bone, then osteomyelitis can be directly attributable to contact with the bacteria that are on the skin and in the skin at the time the bone protrudes through it.

In such an event, I would expect the osteomyelitis, if it developed, to make its appearance quite early or promptly and not months later.

Another circumstance under which osteomyelitis can develop is without any fracture at all, even without any injury, and have the bacterial organisms or germs come through the bone by way of the bloodstream and eventually reach the marrow of the bone and start an infection and produce osteomyelitis.

Q. If a wound were to heal by first intention, within a relatively short period of time, within

(Testimony of Dr. Warren C. Hunter.)

three weeks, and there is no fever, no swelling, no redness, would you then feel that there was osteomyelitis? A. No, I would not.

Mr. Thomas R. Ryan: I think he ought to relate the subsequent history of this thing, if he is going to ask a [371] hypothetical question.

The Court: Let him ask it in his own way. Go ahead. He said no, he would not.

Q. (By Mr. Harr): If there were an infection present in that wound before it was closed, you say you felt it would appear in a relatively short time. Do you think it would appear within three weeks' time?

A. I would expect it to appear right away after failure of union to occur and after failure of the wound in the skin to heal.

Q. Would that be particularly true of the tibia, that close to the surface?

A. The tibia has a bad reputation in that respect. That is all I can say. I am not too familiar with it. I would say in general in any compound fracture I would expect that to happen. I know clinically the tibia does have a bad reputation in that regard.

Q. Following the three-week period I spoke of, this man being injured on June 10th, I believe on July 11th there wasn't good union and the fragments had not healed and it was determined that he should have an open reduction at that time, and that operation was performed, and there was a sliding bone graft made and an Egger's plate applied.

(Testimony of Dr. Warren C. Hunter.)

I will ask you whether or not, regardless of the type of care that was given, whether or not through that [372] operation osteomyelitis and infection could have been injected into the wound?

A. I think one must admit that every time a wound is opened, every time the tissue is exposed there is at least opportunity for infection to take place.

Q. Following that, the wound healed slowly, and in August, about the middle of August, the patient left the hospital, and then he had some angulation, about a five-degree angulation of the tibia; the bone, although it was healing well, it seems, was manipulated by a closed reduction to straighten it more.

Would that be a possible cause of osteomyelitis when you add to that the fact that at the time there is supposed to have been an open wound with some drainage?

A. I am to assume that there was still an open wound with some drainage at that time?

Q. That is the testimony, yes.

A. Yes, conceivably that might happen, that any manipulation of the injury might be done that might make the infection more likely.

Q. If there was infection there, would that manipulation in itself be likely to activate it?

A. It is entirely conceivable, yes.

Q. In November, the latter part of November, the evidence is that the wound was entirely healed and that the bone was [373] solid.

Would you expect osteomyelitis to be present in

(Testimony of Dr. Warren C. Hunter.)

that fracture at that time in the light of that history? A. No, I would not.

Q. If there were a fracture site such as this, healing, and the wound closed, and if a person had a focal infection, such as sinus trouble, would that be carried by the bloodstream and be a possible cause of osteomyelitis?

A. Yes, it might be; one does not have to have a compound fracture in order for osteomyelitis to develop, when it comes to the bloodstream, an infection in some other part of the body.

Q. After having had an operation and being treated, as I have described, is the existence of a fever or the lack of a fever a sign as to whether or not there is infection in the system?

A. We always look upon fever as evidence that something is wrong and we start looking for the source of it, and infection is one of the causes of fever, yes.

Q. If a man is in the hospital, we will say, from June 14th until the middle of August, a little over two months, and his fever stays stable with very little variation, would you expect there to be infection?

A. You said his "fever" stays stable. Did you mean that?

Q. His temperature. [374]

A. By "fever" I would refer to something above normal.

Q. His temperature.

A. His temperature?

Q. Yes.

(Testimony of Dr. Warren C. Hunter.)

A. That is, of course, different. If the temperature stayed normal——

Q. Relatively normal.

A. What do you mean by “relatively normal”?

Q. I believe you could say it stayed normal.

A. I would say that there is no evidence of infection under those circumstances.

Mr. Harr: I think you may inquire.

Mr. John D. Ryan: We have no questions.

(Witness excused.) [375]

DR. RICHARD F. BERG

produced as a witness on behalf of Defendant, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Harr:

Q. Doctor, you are a duly licensed surgeon, physician and surgeon, in the State of Oregon, are you not? A. Yes.

Q. Will you state your qualifications?

The Court: Would you give him the same stipulation he gave you?

Q. (By Mr. Thomas H. Ryan): Yes.

Q. (By Mr. Harr): Did you examine Mr. Amos Morin? A. Yes, sir; I did.

Q. You were given the history of the patient, I believe, of having had a back fracture and a compound fracture of his lower left tibia?

A. That is right.

(Testimony of Dr. Richard F. Berg.)

Q. What was the history that he gave you, Doctor?

A. Well, I saw this gentleman on the 8th of March of 1954. He gave me a history of having suffered an accident on the 10th of June, 1952, when he had fallen from a ladder at his home, suffering injuries to his back and a compound fracture of his left leg. He informed me he was taken to the Physicians and Surgeons Hospital; he received first-aid treatment; and [376] his leg was splinted, and X-rays were taken of his back and leg.

Then he informed me that about two days later he was transferred to the Marine Hospital in Seattle where an open operation was done on the fracture of his leg, open reduction.

About a month after that had been performed the cast was opened by a window and the wound was inspected but, due to the delay in growth, a bone graft was performed. He stated he was in the hospital about 16 weeks and he then came to Portland and he was under the care of Dr. Cherry, and in January of 1953, he was taken, I believe twice, to Providence Hospital and once to St. Vincent's, the first time for manipulation and then later he had the plate which had been previously inserted in Seattle removed, and in February of 1953, he had an acute inflammatory process for which he informed me he was treated at the St. Vincent's Hospital with hot packs, and then, due to the fact that there appeared to be rather extensive and prolonged treat-

(Testimony of Dr. Richard F. Berg.)

ment, he was transferred to the Veterans Hospital here, where he received continuous treatment for a considerable length of time, and had several skin grafts for skin lacerations—I think he had 12 or 13 operations in all on his leg.

The past history that he gave me was essentially negative [377] for injuries, operations or serious illnesses. He had been treated for a peptic ulcer about four years previously. I think that is the main part of the history.

Q. I think the history he gave you is substantially correct. He was in the hospital from June 12th until August 13th or 14th.

A. Yes.

Q. Which was about eight or nine weeks?

A. Yes.

Q. Doctor, to bring you up to date on that, I think it has been shown that he was taken to the Physicians and Surgeons Hospital at about 1:15 on June 10, 1952; that there he was taken to the emergency surgery and given a cursory examination, his trousers were removed, and he was suffering severe pain and he had, for that pain, been given a shot—he had been given a shot of some kind before ever leaving his home; a doctor had been called to his house and had given him this shot of morphine.

He had fallen perhaps 10 feet by the side of his house; he had been on a ladder and the ladder slipped and he fell, and his leg got caught in one of the bottom rungs of the ladder.

The ladder was removed; a blanket was put over

(Testimony of Dr. Richard F. Berg.)

his leg, and he then was transferred by ambulance to the Physicians and Surgeons Hospital where, after a cursory [378] examination and after his trousers had been removed, the wound was cleansed by a mild antiseptic solution and detergent, and it was observed there were two lacerations, one an inch and a half and one about an inch, and after the antiseptic and detergent were applied to the outer edge of the wound, then a saline solution was poured in the wound and over it, and the wound was then covered by a compression bandage and splintered and Ace bandages applied.

Then he was taken to the X-ray and his back and his legs were X-rayed, after which he was taken to his room and his back put in extension and his leg elevated on two pillows.

Assuming those facts to be true, would you, in your opinion, consider that to be suitable treatment by doctors, average doctors in this community and like communities?

A. Yes, as far as you have stated it, I think it is.

Q. At that time he was given penicillin, his blood was typed and cross-matched, blood plasma made ready, and his blood pressure taken; his temperature was 99.2, blood pressure 140 over 88, upon his admission.

Then his pulse increased a little bit so that at 4:00 o'clock the morning of June 11th it was up to 112; his temperature had gone up to 99.6 in the afternoon of June 11th, and a little later the temperature was 100.2. An ileus [379] developed and

(Testimony of Dr. Richard F. Berg.)

his abdomen was distended. He had to be catheterized, and during all of this time he had been in very severe pain in his back and his leg; he was given Deprapanex and received Dromaron on June 10th, to relieve pain and was also given Sedamyl; and then at 8:00 the morning of June 12th, his condition having been considered then to be stable and he not having gone into shock, he was transported by Arrow ambulance to the U. S. Public Health Service in Seattle.

I would like to mention that while he was in the hospital he was given glucose intravenously.

On the trip to Seattle there was an attendant besides the driver of the ambulance. They were with him during the entire trip to Seattle. A. Yes.

Q. Would you say that that was the type of treatment that could ordinarily be expected to be administered at a hospital in this community or like communities by doctors possessed of ordinary skill and diligence?

A. In answering that question, I would say that each individual case is a specific problem. Ordinarily, we like, if we can, to keep our patients quiet until they have overcome any possibility of shock. In this instance, of course, you have two main things to consider, the fractured spine and the compound fracture of the leg, as well as abdominal [380] distention and danger of ileus. Those are common things you expect every time you have a fracture.

Under the circumstances, I would say, inasmuch as there was no possibility of openly reducing the

(Testimony of Dr. Richard F. Berg.)

fracture or continuing the treatment of this man in the present locality, that under those circumstances I see no fault in that at all, in the manner in which it was handled.

Q. With a patient in a hospital, suffering those injuries, is it not a fact that ordinarily doctors give first consideration to a man's general welfare, his general condition?

A. I think every doctor should, yes.

Q. I think it has been developed that this particular patient had a low threshold for pain and he had been suffering more as a result of this at the time of his entrance to the hospital, but I don't suppose his attending physician knew that at that time. He had a difficult problem presented to him. But, isn't it true that the doctor treating the case was, so to speak, in on the ground floor, and isn't it normal he would be expected to know what should be done for the patient?

A. Well, a qualified man, I would say, should have a little better insight into it than someone who had not seen the circumstances. As I stated, every case presents a different situation, and it is hard for me to sit here and put the finger on someone whom I did not watch do the work. Based on general [381] experience, as I say, I see nothing to be criticized in that treatment.

Q. What would be the effect of a general anesthetic if a man was in incipient shock?

A. Well, of course, you don't like to add further shock to him. Anesthesia is a shock, too.

(Testimony of Dr. Richard F. Berg.)

Q. You were in the courtroom when Dr. Hunter was testifying and stated that, in his opinion, if there was infection in this wound it would normally have developed rather rapidly?

A. As a rule it does, yes.

Q. Do you subscribe to that?

A. Yes, sir; I do.

Q. I think the evidence has been that within three weeks after he arrived at the Seattle, Washington, hospital his leg was entirely healed, that is, the wound was entirely healed, but there was crepitation which existed from the operative procedure. In the absence of any fever and the wound being healed, would you consider that there was any infection in the fracture site?

A. Well, I don't think you could assume that there was.

Q. There are many causes, are there not, of osteomyelitis?

A. Yes.

Q. Without repeating the testimony, would you subscribe generally to what Dr. Hunter testified as to the sources of osteomyelitis? [382]

A. Yes, I think he stated it quite concisely.

Q. Are compression fractures usually quite serious, quite painful?

A. Yes, they are as a rule, in the lumbar region, in the dorsal area. Lumbar fractures are painful.

Q. When you have a compression fracture and also a compound fracture of the leg, isn't that situation fraught with danger, I mean as to shock and ileus?

(Testimony of Dr. Richard F. Berg.)

A. Practically all of your fractured spines have some ileus, unless you treat them by relaxation and medical beforehand. That is one of the sources of a great deal of discomfort and trouble. Of course, a leg fracture is painful in any event.

Mr. Harr: I think you may inquire.

Cross-Examination

By Mr. Thomas H. Ryan:

Q. You would consider a compound fracture of the lower third of the tibia more or less a serious situation?

A. Yes, I do. I think that compound fractures any place are an emergency.

Q. Isn't that particular portion of the tibia particularly dangerous, when there is a fracture of that type?

A. There are, in any portion of the tibia, either the upper part or the lower third. [383]

Q. Isn't it ordinarily the practice to go in and clean and debride the wound as quickly as possible?

A. According to our teaching and from the books, that is the thing to do, but, as I said, there are instances where your judgment, after evaluating the situation, looking over the situation, sometimes you defer very active or intensive work.

By "debridement" maybe I mean something else than you do. Debridement is quite an extensive and detailed piece of work. We have to be careful of the nerves and of the blood vessels. Sometimes——

(Testimony of Dr. Richard F. Berg.)

Q. You generally do that right away, don't you?

A. Yes, try to do it right away.

Q. Ordinarily, if you are called in on a compound fracture of that type, do you wait until the next morning before you visit the patient, if you are called, say, in the afternoon?

A. Not ordinarily. I like to do it just as soon as I can.

Q. You would not wait until 11:00 o'clock the next morning to go over to see the patient, ordinarily?

A. Not unless I was pretty assured he was all right and that he had been taken care of.

Q. What about exposure of the wound?

A. Well, there again we run into two schools of thought. In the early days we would have been very much criticized for closing any open wound. Nowadays we close them because [384] we have antibiotics, although you do not have to necessarily suture them, if you put some form of dressing on and cleanse them. They are continuously filling in, you know.

Mr. Thomas H. Ryan: That is all.

Mr. Harr: That is all.

(Witness excused.)

Mr. Harr: The defendant has no further testimony.

The Court: Any rebuttal?

Mr. Thomas H. Ryan: No rebuttal.

(Argument of counsel.) [385]

August 19, 1954

PLAINTIFF'S TESTIMONY AS TO
ATTORNEY'S FEES

JOHN D. RYAN

produced as a witness on behalf of Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thomas H. Ryan:

Q. You are John D. Ryan, an attorney?

A. Yes.

Q. You represent Amos Morin, plaintiff, in a case against the United States of America?

A. Yes, sir; I do.

Q. When did you become his attorney in that matter?

A. I was retained by Mr. Morin the 13th of February, 1953. [386] At the time Mr. Morin came into my office, he informed me he had had an injury to his leg that he felt was aggravated by the treatment he received, and at that time we were not certain who the defendant would be because there were both the individual doctors, the hospital, and the United States Government involved.

Mr. Morin at that time was asked by me whether he had any funds with which to retain me and he said no. At that time I explained to him the possibility of handling the case on a contingent basis, which I did, and subsequently, when it was deter-

(Testimony of John D. Ryan.)

mined the United States Government was a proper party, a proper defendant, I explained to Mr. Morin the nature of the Federal Tort Claims Act and the nature of a contingent case under that Act, and the fact that the fee would be set by the Court at the completion of the trial in the event we were successful; in the event we were not successful, he would owe me no money for my services.

The Court: How much did you contract for before you found out the case came under the Federal Tort Claims Act?

The Witness: I followed the minimum bar fee, the schedule of the Oregon State Bar, of 25 per cent if a settlement was made prior to filing, one-third for settlement after filing and before trial and 40 per cent in case of a trial.

The Court: Who puts up the money for expenses?

Mr. John D. Ryan: The client. [387]

The Court: Suppose he does not have it?

The Witness: If he does not have it, we would make the advance.

Q. (By Mr. Thomas H. Ryan): Did you arrange to get medical testimony in this case?

A. I did. I interviewed one of the treating doctors regarding this case and several other physicians of my acquaintance for the purpose of corroborating him, and that was the basic problem of the case.

I had a number of conferences with Dr. Cherry at the time I undertook the case—I would say there were three in all—to determine the validity of the

(Testimony of John D. Ryan.)

claim being made from a medical standpoint, prior to preparing my complaint.

At the same time I did considerable research or had considerable research to make as to the basis of the cause of action, just what the cause of action would be against the Government, and it was determined it was a tort case under the Federal Tort Claims Act. My conferences on the medical evidence continued up until the time of trial.

After the preparation of pleadings, I had to confer with doctors on several other points of interest, as far as I was concerned, due to possibility of settlement, in order to endeavor to convince the U. S. Government of the validity of the case. [388]

Then, at the time when the trial of the case became certain, I had further conferences with Dr. Cherry, in April and May of this year; I had three separate conferences with Dr. Cherry regarding preparation for depositions taken of Dr. Craig and Dr. Schneider, the nature of the questions to be asked, concerning hospital procedures and treatment. That is about the extent of my conferences.

Q. Did you do any research in the medical field yourself?

A. Yes. I was assisted by Dr. Cherry, after having been given some texts, Campbell's "Operative Procedures" and the Pictorial Handbook on fracture treatment, which I read. I also had and read other books on medicine and fractures, and particularly Christopher's "Operative Orthopedics."

(Testimony of John D. Ryan.)

The Court: Did you ever have a proposition for settlement?

The Witness: I never had.

The Court: Did you invite one?

The Witness: I did ask if there was a possibility of settlement and was informed that there was not.

Q. (By Mr. Thomas H. Ryan): You took that up with Mr. Harr?

A. I took that up with Mr. Harr.

Q. I also have cooperated with you throughout this case?

A. You have cooperated with me, yes, and particularly in the time of the preparation of the case when you assisted me in determining the method we would follow. [389]

Q. Ordinarily in a case like this you would have followed the Bar fee?

A. We do that in the usual case, yes.

Q. You were in court here three days and then another half-day for argument?

A. That is correct.

Mr. Thomas H. Ryan: No further questions.

The Court: Do you have some questions?

Mr. Harr: No, your Honor. [390]

JAMES LANDYE

produced as a witness on behalf of the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thomas H. Ryan:

Q. Your name? A. James Landye.

Q. Your occupation? A. Lawyer.

Q. For the record—I know the Court knows who you are—would you tell what positions you have held with the State Bar and the local Bar Association?

A. I have been President of the Multnomah County Bar and a member of the Board of Governors of the State Bar.

Q. Are you familiar with the fee ordinarily charged on a contingent basis in a malpractice case in this city and state? A. Yes.

Q. What is that?

A. It runs the same as the others, 25, 35 and 40 per cent.

Q. You heard Mr. Ryan's testimony. Would you say that would be a reasonable fee in this type of case?

A. Yes, I would say in a malpractice case 40 per cent would be a reasonable fee.

The Court: If a fee is allowed here, the maximum permitted [391] by the statute is 20 per cent.

The Witness: In the absence of a statute, I would say 40 per cent, but, as the statute only provides for 20, I would say 20 per cent is the minimum.

(Testimony of James Landye.)

The Court: I wonder if anybody knows what has been the practice in the District Court in connection with Federal tort claims, whether it has been the uniform practice to allow 20 per cent. I don't know. I have been doing it, but I don't know what the other judges have been doing.

Mr. Thomas H. Ryan: I understood, just by hearsay, that was the practice.

The Court: Uniformly, after trial?

Mr. Thomas H. Ryan: I understand so, now. I don't know. I was told by someone.

The Court: Any questions?

Mr. Luckey: No questions.

(Witness excused.) [392]

DONALD H. JOYCE

produced as a witness on behalf of the Plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Thomas H. Ryan:

Q. You are Donald H. Joyce? A. Correct.

Q. What is your occupation?

A. An attorney.

Q. Are you acquainted with the fee ordinarily charged in a malpractice case in Oregon?

A. Yes. Most lawyers in this locality go by the minimum Bar Schedule, 25 per cent if the case is settled before filing; $33\frac{1}{3}$ —or 35; some charge 35—

(Testimony of Donald H. Joyce.)

if it is settled after the action is brought; and 40 per cent after trial.

However, it is the practice of many lawyers in a malpractice case to charge a fee above the minimum proposed fee as set by the Oregon State Bar, because it is a difficult case to try and a difficult case to win.

Q. Have you had any cases under the Tort Claims Act? A. I have.

Q. In this Court?

A. I tried one here about two and a half years ago in this very courtroom before the Honorable Gus Solomon.

Q. What was the fee allowed? [393]

A. The fee allowed there was 20 per cent.

Q. Considering the verdict was \$45,000 general damages and \$4,711 special damages, what would you say would be a reasonable fee in that type of action described by Mr. Ryan?

A. I can see no difference in this case from any other type of damage action. I am aware of the limitation imposed by the Tort Claims Act of 20 per cent. I think the maximum should be the minimum in this type of action. The only justification for that fee of 20 per cent I would say that here we have a solvent defendant where you can collect the judgment.

The Court: In a malpractice case it is hard to get doctors to testify against each other. Isn't that one of the problems?

Mr. Thomas H. Ryan: It is a big problem.

(Testimony of Donald H. Joyce.)

The Witness: It has been necessary for me to take nonsuits before trial because the doctors run out on me.

The Court: Strictly speaking, I don't know whether you can do it with a malpractice case or not, as this case arises under a special statute. There is another statute, however, that has to be kept in mind. This action arises under a statute which makes it the duty of one of the agencies of the Government, the Public Health Service, I believe that is the name, to provide adequate medical service and hospital care for seamen. That is a [394] statutory duty. That is an overriding duty, over and above the obligation that a service takes when a plaintiff comes into this Court. I don't know whether that subject has ever been explored or not, but that would affect the standards of the Court to be observed. It has been in my mind all throughout this case.

As to this particular question, it seems to me it would be good practice for you to offer additional findings of fact which could be in very few words. Our rules permit additional findings to be presented. I don't know whether you are within time or not. Maybe the limit is ten days.

Do you have any questions?

Mr. Luckey: No questions.

(Adjournment.) [395]

Reporter's Certificate

I, Ira G. Holcomb, an Official Reporter of the above-entitled Court, do hereby certify that on the 21st, 22nd and 23rd days of July, 1954, and on the 19th day of August, 1954, I reported the proceedings had in the above-entitled matter, that I thereafter caused my said shorthand notes to be reduced to typewriting under my direction, and that the foregoing transcript, consisting of Pages numbered 1 to 395, both inclusive, constitutes a full, true and accurate transcript of said proceedings so reported by me in shorthand on said dates, as aforesaid, and of the whole thereof.

Dated at Portland, Oregon, this 28th day of September, 1954.

/s/ IRA G. HOLCOMB,
Official Reporter.

[Endorsed]: Filed October 11, 1954. [396]

JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION
EXHIBIT NO. 12

DRS. BLAIR, THATCHER & DAVIS

STANDARD INSURANCE BUILDING
PORTLAND 5, OREGON

NAME MORINAMOS R. No. 77140 DATE 8/24/52 at Prov. AGE 44 YRS.
 ADDRESS RES. 4640 N.E. 30th PORTLAND
BUS. U.S. Engineers, Dredge Worker REFERRED BY Dr. J. Thorup
 TEL NO. RES. _____ BUS. _____ OCC. dredge worker
 RESP. self and Blue Cross

DIAGNOSIS

HISTORY

fell from ladder at home, fract. shaft of left tibia
 near the junction of the middle and distal thirds

OCT 29 1952

x-ray. Proximal tibia

NOV 24 1952

Hunter bad at top of plate.
 Fracture is solid. Tox heat
 to area.

JAN 24 1953

Severe inflamed skin to Prov.

FEB 11 1953

To Prov. Abscess opened.
 Plate out.
 Wound dressed. Black on edge.

FEB 1 1953

MAR 2 1953

Dry crust. Improving.

MAR 6 1953

APR 1 1953 Dry crust. Hard in lower thigh
& ankle.

APR 16 1953

Empire no ~~the~~

APR 25 1953

Referred to both. Found no skin
rash but is tender - some
of painful

JUN 19 1953

AUG 15 1953

JAN 9 1954

Gerald.

FEB 6 1954 O.O.

10 ~~10~~ Hunt last ~~thru~~ - April 1st
first day on job - working for US Engineers
doing dredge work - has on the job
coverage but thru Public Health.
so will pay it himself
Has severe tenosynovitis & - marks
crepitus. Rt cast applied.

PLAINTIFF'S EXHIBIT No. 13

Campbell's
Operative Orthopedics

Editor
J. S. Speed, M.D.

Associate Editor
Hugh Smith, M.D.
Memphis, Tenn.

Second Edition

With 1141 Illustrations
Including 2 Color Plates

Volume I

St. Louis
The C. V. Mosby Company
1949

Operative Orthopedics

Compound Fractures

As previously stated, the object of treatment of fractures is the establishment of union in good position, and the restoration of maximum function to the injured parts. In the accomplishment of this purpose in compound fractures, the treatment of the

Plaintiff's Exhibit No. 13—(Continued.)

wound and the prevention of pyogenic and clostridial infection assumes primary importance. The object of emergency treatment is the conversion of a contaminated wound to a clean wound, thereby promoting early healing of the soft tissues, and the conversion of a potentially infected open fracture to a healed, closed one. Treatment of the fractured bone is secondary to the prevention of infection.

The first consideration is the patient's general condition. Emergency measures (Chapter I) are frequently necessary to combat pain, hemorrhage and shock; thereafter, attention is directed to the local condition. From the time of injury until the patient is ready for the local preparation, the wound should be protected by a dressing and the extremity splinted.

In taking the history, one should note how, when, and where the injury occurred; in the examination, one should determine the extent and type of soft tissue wound, the existence of any vascular or neurologic damage, and should have roentgenograms made to show the extent and type of injury to the bone. In many cases, the true extent of soft tissue damage cannot be ascertained until surgical exploration is possible. Time, and the type and extent of soft tissue damage are two factors which have a direct bearing on the method of treatment.

Surgery should be carried out as soon as the patient's general condition will permit. Compound

Plaintiff's Exhibit No. 13—(Continued.)

fractures are emergencies. With the passage of time, the probability of infection increases rapidly. An elapse of twelve hours is usually considered the limit between a contaminated and an infected wound. The time limit is less in more extensive and severe wounds. In order to provide some yardstick to parallel the time rule, wounds may be classified as follows:

Type 1.—Small puncture wounds caused by a protrusion of bone from within out, or by a bullet passing from without in; i.e., minimum damage to soft tissue.

Type 2.—Wounds extensive in length and breadth, but with little or no avascular, or devitalized soft tissues and relatively little foreign material.

Type 3.—Wounds of moderate or massive size, with considerable necrosis of the soft tissues. The presence of foreign material increases the degree of severity.

It should be noted that the differentiation of wounds in the three types is based principally on the amount of avascular or devitalized tissue.

A proper evaluation of the wound, the time factor, and the efficiency of the debridement will determine the extent of bone surgery, the feasibility and extent of internal fixation, and whether primary closure or drainage of the wound is preferable.

The following treatment is based upon the premise that conditions for treatment are ideal; i.e., that

Plaintiff's Exhibit No. 13—(Continued.)

adequate splinting will be utilized to minimize the trauma of transportation; that patients will ordinarily arrive within twelve hours after the injury at a hospital equipped to provide adequate emergency treatment; that surgery will be effectually carried out; and that constant observation by a well-trained personnel can be assured during the post-operative period.

Local Preparation.

The area surrounding the wound is thoroughly cleansed with green soap and water, the wound remaining covered with a sterile dressing. With a sterile razor, the field is then shaved and the skin cleansed with benzine and ether. To prevent further contamination, all solutions must be applied in an ever-widening circle from the edges of the wound. The wound is thoroughly irrigated with copious quantities of saline solution. During irrigation, all portions of the wound, including the ends of the fragments, are exposed and gently massaged to remove as much extraneous material as possible. Mechanical washing of the wound is of far more importance in the prevention of sepsis than the application of antiseptic solutions; in fact, the majority of antiseptic solutions irritate the tissues and do actual harm. After application of the routine operating-room antiseptics to the skin around the wound, the field is draped.

Plaintiff's Exhibit No. 13—(Continued.)

Treatment of the Soft Tissues.

For small puncture wounds induced by indirect violence, the preliminary cleansing is usually sufficient. The serrated borders of the skin are excised, and the wound loosely closed. Probing in the wound, and the injection of antiseptic solutions are contraindicated, since these measures induce additional organisms into the wound and disseminate those already present. If a fragment of bone protrudes from the skin, the end is cleansed with ether and washed with saline solution. In such cases, the wound must frequently be enlarged to permit reduction of the fracture. The wound may also be enlarged to permit the use of internal fixation, if this is indicated.

Debridement is a term rather loosely applied in the American literature to cover the following procedure: exploration of the wound; excision of devitalized tissue; eradication and elimination of foreign material; repair of damaged structures. This procedure is applicable to the wound of type 2 and type 3 compound fractures, and must be carried out systematically and thoroughly. The superficial wound must be extended sufficiently for complete exposure of all of the involved deeper structures. On the other hand, dissection should be limited to the minimum requirements to prevent dissemination of the contamination and an unnecessary addition to pre-existing trauma. Beginning superficially with

Plaintiff's Exhibit No. 13—(Continued.)

the skin, excision of devitalized structures should proceed layer by layer to the depths of the wound, with due regard for essential anatomic structures, such as vessels, nerves, and tendons. The skin should be excised sparingly, keeping in mind the possibility of closure. All foreign material must be eradicated either by washing and lavage, or by excision of the adjacent tissue to which it clings.

Lacerations of tendons or nerves are repaired efficiently, but with less detail and precision than is observed in selective operative procedures. The necessity for care in handling of the soft tissues cannot be over-emphasized, however, as necrosis incident to excessive trauma provides an excellent medium for growth of bacteria. A minimal amount of catgut should be introduced into the wound. As a final step in the handling of the soft tissues, the wound is again thoroughly washed with copious quantities of saline solution.

Antibiotics are not a substitute for careful debridement. Hampton's observations of battle casualties support this view. He observed that penicillin will protect living tissue against the invasion of infection; that penicillin will not sterilize devitalized infected tissue which inadvisedly or of necessity remains in the wound; that it will not prevent septic decomposition of a contaminated hematoma, nor will it neutralize locally necrotizing enzymes in undrained parts. Wounds which are free of devital-

Plaintiff's Exhibit No. 13—(Continued.)

ized tissue, foreign material, and large hematomas are likely to heal without sepsis.

Treatment of the Bones.

The principles of proper handling of the periosteum and bones in selective surgical cases are outlined in the first of this chapter. Their application is even more important in compound fractures. Loose particles of bone are left in situ, as large defects between the fragments impair the progress of union. Small particles with their periosteum and soft tissue attachments intact may even act as small grafts and may possibly stimulate osteogenesis. Fragments of bone filled with foreign material, grease, or dirt, which cannot be thoroughly cleansed, provide an exception to this rule. Small fragments are removed in toto; the ends of the larger fragments are excised to clean bone.

The fracture must be reduced and immobilized. The method whereby this is accomplished will depend upon the bone involved, the type of the fracture, the efficiency of the debridement, and the patient's general condition. If it seems desirable to limit the trauma from surgery to a minimum, and the fracture is transverse, reduction may be accomplished manually, and a cast applied as for a closed fracture; the cast is then bivalved to allow inspection of the extremity. Compound fractures of the shaft of the humerus may be temporarily immobilized on an abduction humerus splint, to be followed by a hanging cast.

Plaintiff's Exhibit No. 13—(Continued.)

For the femur, skeletal traction with the extremity supported in a splint is often advantageous in maintaining proper alignment of the fracture, while providing for inspection of the wound. Before inserting the wires, the operator should change his gown and gloves, and completely redrape the field.

After the introduction of the sulfa drugs, and particularly the antibiotics, we advocated the use of metallic internal fixation in compound fractures, based upon essentially the same indications as observed in closed fractures, provided primary healing might reasonably be expected following closure of the wound. The use of metallic internal fixation is by no means a routine procedure; in a relatively large series of cases, however, the number of infections has been no larger than previously, reductions have been relatively anatomic, and in the majority, union has taken place at practically the same rate as in selective surgical cases. If infection or sepsis develops and external fixation must be partially removed to permit inspection and dressing of the wound, internal fixation maintains the reduction. Though drainage may persist and union progress slowly because of infection, one troublesome factor in the management of these cases is eliminated. In utilizing metallic internal fixation, one must be cognizant of its disadvantages; in the majority of cases, additional trauma will be created by exposure and stripping incident to the application of the fixation material. Regardless of how inert it may be, the

Plaintiff's Exhibit No. 13—(Continued.)

metal must be considered a material foreign to the normal anatomic structures. If sepsis ensues, draining sinuses will probably continue until the metal is removed. The use of internal fixation under unfavorable conditions is likely to lead to undesirable sequelae.

In compound comminuted fractures of the lower third of the tibia, with a fracture of the fibula at the same level, the plate and screws may be applied through a separate incision to the fibula, with care to prevent contamination from the compound wound. In fractures of both bones of the forearm, the same principle may be applied, i.e., stabilization of one bone may obviate the necessity of metallic fixation of the other fracture through a more contaminated wound.

Primary or Secondary Closure; Closed Plaster Method.

With the completion of debridement and reduction of the fracture, the question immediately arises as to the advisability of closing the wound, i.e., whether or not partial closure with drainage should be instituted, or whether the wound should be left completely open, and early healing prevented by the use of petrolatum gauze. Although no rule can be rigidly applied, the following suggestions are offered: In type 1 and type 2 wounds of less than twelve hours' duration, the wound is usually loosely sutured with silk and drains are omitted. The same

Plaintiff's Exhibit No. 13—(Continued.)

procedure is applicable to a few of the less severe type 3 wounds. As so aptly put by Hampton, complete closure of the wound is justified only when the "pabulum" of wound sepsis is nil. As an added safety factor, in the more severe injuries, drainage may be established by a cigarette drain or petrolatum gauze, either in the most dependent portion of the wound or through counter incisions. When the wound is of more than twelve hours' duration, or the soft tissues are so extensively damaged that devitalized tissue must, of necessity, be left in the wound, continuous drainage from the depths of the wound should be insured with petrolatum gauze. As a rule, type 3 wounds, or those of more than twelve hours' duration, should not be closed.

If surgical judgment dictates that there is some doubt about the feasibility of closing the wound, it is better to follow a conservative course by allowing unimpeded drainage from an open wound. Statistics from battle casualties of World War II have conclusively proved that, with the use of antibiotics, secondary closure of open wounds on the tenth to fourteenth day is practicable. Secondary healing of the wound should take place in 80 per cent of properly selected cases. By this method, the hazards of a continuously draining open wound, namely, sequestration of exposed bone cortex, sloughing of tendons, muscle, and fascia, reinfection of the wound with a mixed bacterial flora at dressings, and prolonged healing of the wound attended by excessive scar

Plaintiff's Exhibit No. 13—(Continued.)

formation, are obviated. In doubtful wounds, continuous drainage should provide a tremendous safety factor against pyogenic or clostridial infection. If the wound is clinically clean after ten to fourteen days, secondary closure may be instituted.

In civilian practice, the closed plaster method of treating compound fractures has a limited application, namely, severe type 3 wounds, usually of the hip and upper third of the thigh or shoulder. Shotgun wounds are notorious examples of this group. Because of the excessive amount of foreign material in the wound, the anatomic restrictions imposed upon surgery, and the excessive damage to the soft tissue structures, some degree of sloughing and sepsis is inevitable. Even without infection, the natural reparative and absorptive powers would hardly be able to cope with the foreign material and the devitalized soft tissue. This type of injury also presents a fertile field for anaerobic infection. In these cases, continuous drainage must ordinarily be maintained for a period of weeks or months.

After-Treatment.

The extremity must be thoroughly immobilized to insure rest for the injured tissues. Edema is minimized by elevation of the extremity and the provision of dependent drainage. A removable pressure dressing also facilitates the healing of the wound. Constant observation should be maintained that any disturbances or impairment in circulation or the

Plaintiff's Exhibit No. 13—(Continued.)

onset of pyogenic or gas infection may be promptly discovered.

Mixed antigas and antitetanus sera are routinely administered. As a precaution against anaphylactic reactions prior to injection, a small amount of the antitoxin should be introduced intradermally to determine whether the patient is sensitive to the sera. The value of prophylactic roentgen therapy or anti-gas serum is questionable. In massive type 3 wounds, the administration of a second dose of antitetanus serum after ten days may be advisable.

Penicillin is invariably administered in rather massive doses (p. 16) until all danger of sepsis has passed. For the reasons stated above, penicillin alone is not insurance against a pyogenic or gas infection. In combination with good surgery and surgical judgment, however, penicillin provides a tremendous safety factor in the prevention of stormy inflammatory processes.

PLAINTIFF'S EXHIBIT No. 24

Warren C. Hunter, M.D.
Physician - Pathologist
U. of O. Medical School
Portland 1, Oregon

Report of Consultation

Accession No.: S-52-1702 (USPHS Hosp., Seattle)

Physician: A. T. Morrison, Senior Surgeon.

Patient: Amos R. Morin.

Tissue: Microscopic section only.

Date Reported: April 13, 1954.

Hospital: USPHS Outpatient Clinic, Portland, Ore.

Address:

Date Received: April 13, 1954.

Gross Description:

On the slide bearing the above number are five sections, stained with hematoxylin-eosin. The slide is additionally identified by the patient's name, as given above.

Microscopic:

It is understood from a conversation with Dr. Morrison, who delivered the section to me personally, that the tissues represented in the sections came from the site of a compound fracture of a lower extremity some little time after the fracture occurred

and that these were removed at the time of an open reduction of the fracture.

Four of the tissues on this slide are bits of bone, with a little marrow only. There is neither inflammation nor necrosis of either bone or marrow.

The fifth and much the largest of the sections consists principally of connective tissue and fat, although at one margin there is a bit of callus and young trabeculated bone and at one other point there is a particle of bone embedded in connective tissue. The latter is not necrotic but its position makes one think that it may represent a tiny sequestrum from the fracture site in all probability. At times monocytes, lymphocytes and foreign type giant cells occur in the connective tissue but aside from these there is no suggestion of anything inflammatory at all. Parts of the connective tissue give evidence of recent formation. At one point a few skeletal muscle fibers have become incorporated in the connective tissue.

The question asked of me by Dr. Morrison is whether there is evidence of infection in this tissue. The answer is no; there is but little inflammation at all and this is not the type of reaction that one would expect to an infectious agent.

/s/ WARREN C. HUNTER,

WARREN C. HUNTER, M.D.

Request that enclosed copy be sent to Dr. Perrin.

PLAINTIFF'S EXHIBIT No. 25

March 10, 1954.

Dr. A. T. Morrison,
Public Health Service,
Court House,
Portland, Ore.

Re: Mr. Amos Morin.

Dear Dr. Morrison:

This patient reported to my office on the 8th of March, 1954, for a special examination.

Chief complaints at the present time:

1. Pain and weakness in the knees and the left leg.
2. Pain and discomfort, with drainage in the left lower tibia.

History:

This patient informs me that he originally suffered injuries on or about the 10th day of June, 1952, when he fell in coming down a ladder while painting his home in Portland, Ore., and as a result, suffered a compound fracture of both bones of the left leg. He was taken to the Physicians & Surgeons Hospital immediately where first aid treatment was rendered and his wounds were cleansed and dressed. After reviewing and evaluating the situation, it was decided to transfer him to the Marine Hospital in Seattle, Wash., which was done two or three days later and there an open reduction and thorough

Plaintiff's Exhibit No. 25—(Continued.)

cleansing and inspection of the compound wounds were carried out. He states he was in a cast for some time, and he stated that the wound became inflamed and an inspection window was cut in the cast. One month after this, the cast was cut off and the wound was completely healed but the bone position was not considered satisfactory according to his statements to me, and he was again taken to surgery, and this time a sliding bone graft and the application of a metallic plate was carried out. He was there for approximately 16 weeks. Then, due to the fact that he wished to return home he left the hospital against advice and came to Portland. He was then taken to Providence Hospital and was under the care of Dr. Cherry and remained in Providence Hospital for about four weeks. At that time, the plate from his tibia was removed due to the fact that it was either bent or causing some local irritation. A cast was reapplied to his leg, and the bones were realigned and he was sent home, however, leg bothered him and he was taken the next time to St. Vincents Hospital where he remained for a period of about one week for dressings, hot applications, etc. Finally, due to the fact that the condition did not appear to be healing normally and looked like a long drawn-out case, he was transferred to the Veterans Hospital in February of 1953, where he remained for about one year for treatment. During his treatment there, numerous skin grafts were applied to the denuded area over the bone, and he had several operations approximately twelve or thirteen

Plaintiff's Exhibit No. 25—(Continued.)

in all. He has now been out of the hospital for some time, and of course, has the weakness in his legs due to the inactivity and still has a little drainage from the bone on the left leg.

Past History:

This patient also suffered an injury to his lumbar spine which was treated by the application of a body cast and by bed rest. The patient informs me that there was a compression fracture of the 2nd lumbar vertebra, but that the back does not bother him to any extent at the present time. He states he has had no previous operations. He has had a Duodenal Ulcer which has given him some trouble but seems to have cleared up under treatment about four years ago. The rest of his systematic questionnaire was essentially negative from an orthopedic standpoint.

Examination:

This patient is 45 yrs. of age, he walks with a slight left-leg limp. Examination of his head and neck revealed no evidence of any pathology there. His upper extremities were within normal limits. His back motions revealed a little tenderness and pain in the lumbar area, and there is some restriction on forward and lateral bending in this area. Points of maximum tenderness appeared to be in the mid lumbar section. His hip motions approached normal. His straight leg raising tests approached

Plaintiff's Exhibit No. 25—(Continued.)

normal. His reflexes were active and equal. Examination of his lower extremities revealed donor sites of numerous skin grafts, the split-thickness type from the left thigh. There is a healed large scar on the calf of the left leg from which a pedicle skin graft was taken. Examination of his left leg reveals a slight drainage from the wound in the lower anterior portion of the leg which appears to be directly connected with the bone. Numerous skin grafts have been applied to this area, but there is one denuded section which is still unhealed. In general, the alignment of the leg appears to be quite satisfactory. There is a slight tendency toward inward bowing, but this is not enough to cause any definite disability. The movements in his ankle approached normal and he complains of no pain or swelling there. Pressure over the fracture site of his tibia is not especially uncomfortable. No other pathology was noted at the time of this examination, other than a slight atrophy of the muscles incident to his trauma and the disuse of his leg.

Comment:

In my opinion this patient evidently suffered a rather marked compression fracture of the lumbar vertebra which at the present time shows some permanent wedging and fairly solid bone consolidation. There is no other noteworthy change seen in this area, other than minimal arthritic changes which are present on the anterior projection of the x-rays

Plaintiff's Exhibit No. 25—(Continued.)

chiefly. The second and major difficulty in this instance is the old compound fracture of the left tibia and fibula, at the junction of the lower third with the upper two-thirds of the bone, complicated by osteomyelitis, and associated with a fracture of the shaft of the fibula just beneath the upper limits of the shaft. The present situation indicates that there is no marked activity than a small sequestra which appears to be present in the lower portion of the wound, and which I believe is the source of his present drainage. The shaft shows fairly normal consistency, except of course, at the area of the fracture and the healed section. Good solid bony union has taken place across the fibula and the tibia at this level. The fracture in the upper shaft of the fibula is completely healed. The ankle mortise is tilted approximately 10 degs. inward on account of the slight inward bowing of the tibia.

It is my feeling that this man's treatment has followed the pattern which is quite common in severe injuries such as his, and that unfortunately he developed some osteomyelitis which is likewise a fairly common incident in traumatic compound fractures. At the present time, I think the persistence of the drainage is probably due to the small sequestrum which is visible in the lower portion of his wound and which will probably be extruded spontaneously if it is not curetted out before that time. The disability in his leg I think will be greatly lessened when the wound heals, and aside from the

Plaintiff's Exhibit No. 25—(Continued.)

possibility of future injury, I think that this man can probably carry on some work. However, if he is going to work at the present time, I feel that there should be some allowance made for the fact that he still has a chronic osteomyelitic process, with a small sequestrum in the lower portion of the wound.

Very truly yours,

RICHARD F. BERG, M.D.

RFB:es

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

Nov. 17—Filed complaint.

Nov. 17—Issued summons—to Marshal.

Nov. 19—Filed summons with Marshal's return.

1954

Jan. 15—Filed answer.

Feb. 23—Entered order setting for pre-trial conference Apr. 19, 1954.

Apr. 19—Entered order setting for pre-trial conference May 3, 1954.

May 5—Filed 3 petitions for issuance of subpoenas duces tecum.

May 17—Filed and entered 3 orders for subpoena duces tecum.

1954

- May 17—Issued 3 subpoenas duces tecum—to Marshal.
- May 24—Record of hearing in response to subpoena duces tecum.
- May 25—Filed 3 subpoenas duces tecum with Marshal's return.
- May 28—Filed deposition of C. O. Schneider.
- July 1—Entered order setting for trial on July 15, 1954.
- July 7—Filed deposition of Lee A. Craig for pltf.
- July 13—Issued subpoena—2 copies—to pltf's. atty.
- July 14—Filed motion for subpoena duces tecum.
- July 14—Filed petition for subpoena duces tecum.
- July 14—Filed and entered order for issuance of subpoena duces tecum.
- July 14—Issued subpoena duces tecum, handed to Marshal.
- July 15—Filed subpoena duces tecum with Marshal's return.
- July 15—Filed subpoena with Marshal's return.
- July 14—Entered order resetting cause for trial July 21, 1954.
- July 21—Filed and entered pre-trial order.
- July 21—Record of trial before the Court.
- July 22—Record of trial before the Court.
- July 23—Record of trial before the Court submitted.
- July 23—Filed exhibits: Plaintiff's 1, 2a to h, 3, 4a to j, 5a and b, 6, 7, 8, 10 to 16; Defendant's 17, 18, 20, 21a and b, 23a to e, 24, 25, 26.
- Aug. 3—Record of trial (arguments).

1954

- Aug. 4—Record of opinion.
- Aug. 4—Filed opinion.
- Aug. 10—Filed and entered findings of fact and conclusions of law.
- Aug. 12—Filed praecipe U. S. Atty. for certified copy of judgment. Issued 8-27-54.
- Aug. 19—Record of hearing on attorney fees and entered order allowing 20%.
- Aug. 20—Filed and entered additional and supplemental Findings of Fact.
- Aug. 26—Filed and entered judgment for plaintiff for \$45,000.00 general damages, \$4,711.27 special damages, \$58.98 costs and allowing \$9,942.25 attorney's fees out of recovery.
- Aug. 26—Filed cost bill.
- Aug. 27—Filed notice to tax costs.
- Sept. 20—Filed stipulation re cost bill.
- Sept. 20—Filed and entered order to substitute cost bill.
- Sept. 20—Filed substitute cost bill. Costs taxed at \$48.98.
- Sept. 20—Filed praecipe U. S. for cert. copy of substitute cost bill. Issued 9-21-54.
- Oct. 11—Filed transcript of proceedings, July 21, 22 and 23—Aug. 19, 1954.
- Oct. 25—Filed notice of appeal by defendant and copy mailed to Ryan & Pelay.
- Dec. 2—Filed motion for order allowing U. S. 90 days from date notice of appeal to file and docket appeal.

1954

Dec. 2—Filed and entered order allowing U. S. 90 days from date notice of appeal to file and docket appeal.

1955

Jan. 12—Filed designation of contents of record on appeal.

Jan. 14—Filed stipulation for order to send exhibits to Court of Appeals.

Jan. 14—Filed and entered order to send exhibits to Court of Appeals.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, F. L. Buck, Acting Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Answer; Pre-trial order; Memorandum of Judge Claude McColloch; Findings of Fact and conclusions of law; Additional and supplemental findings of fact; Order re: attorneys' fees; Stipulation re: "Substitute Cost Bill"; Order re: "Substitute Cost Bill"; Substitute cost bill; Judgment; Notice of appeal; Motion to extend time for docketing appeal; Order extending time for docketing appeal; Designation of contents of record on appeal; Stipulation to forward exhibits to Court of Appeals; Or-

der to forward exhibits to Court of Appeals; and Transcript of docket entries, constitute the record on appeal from a judgment of said Court in a cause therein numbered Civil No. 7260, in which the United States of America is the defendant and the appellant and Amos R. Morin is the plaintiff and the appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this Court.

I further certify that there is also enclosed a copy of the transcript of proceedings of July 21, 22 and 23, 1954, and August 19, 1954. The exhibits will be forwarded under separate cover at a later date.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of said Court in Portland, in said District, this 18th day of January, 1955.

[Seal] /s/ F. L. BUCK,
Acting Clerk.

[Endorsed]: No. 14627. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Amos R. Morin, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed January 19, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14627

UNITED STATES OF AMERICA,

Appellant,

vs.

AMOS R. MORIN,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant respectfully submits the following Statement of Points upon which appellant intends to rely on appeal:

1. The evidence in the case fails to establish that there was any deficiency in the treatment accorded appellee in the Physicians & Surgeons Hospital at Portland, Oregon.

2. If there was a deficiency in the treatment accorded appellee as charged, the evidence fails to establish that it was the direct and proximate cause of appellee's osteomyelitis, or the residual disability, pain and suffering resulting therefrom.

3. The Court erred in finding that appellant, in treating appellee, did so in a negligent, careless manner proximately causing injuries to appellee, by failing to render appellee immediate, adequate and proper medical and surgical treatment, cleanse

debridement and closure of wounds at the site of the fracture of the left tibia.

4. The Court erred in finding that appellant, in treating appellee, failed to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon, and like communities in the treatment of the comminuted compound fracture of the left tibia.

5. The Court erred in rendering a verdict in favor of appellee and against appellant because there was no substantial evidence to support said verdict.

6. The District Court erred in making and entering its Judgment, dated August 26, 1954, herein appealed from, by ordering, adjudging and decreeing judgment in favor of appellee herein and against the United States of America, appellant herein, for the reasons set forth in specification of errors Nos. 1 to 5, inclusive, herein designated.

7. That the verdict as rendered by the District Court was excessive.

8. The District Court erred in finding that appellee would be required to undergo further operations.

Dated at Portland, Oregon, this 26th day of January, 1955.

C. E. LUCKEY,
United States Attorney
for the District of Oregon;

/s/ VICTOR E. HARR,

Ass't. United States Attorney
Of Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed February 1, 1955.

[Title of Court of Appeals and Cause.]

STIPULATION WITH RESPECT TO
PRINTING OF THE RECORD

Whereas there are in this cause a substantial number of X-rays and a substantial number of documentary exhibits (including hospital records, payroll and employment records, and a textbook of surgery) which would be very expensive to print, but which each party on brief and in argument will wish to refer to;

It Is Hereby Stipulated by and between the parties, through their attorneys of record, subject to the approval of the Court, that all of the exhibits referred to in Paragraph 12(b) of the Stipulated Designation of Contents of Record on Appeal herein may be considered by this Court in their original form and need not be printed in the record.

The exhibits to which this stipulation refers are numbered Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 14, 15, 16, 17, 18, 20, 21 and 23.

Dated this 26th day of January, 1955, at Portland,
Oregon.

C. E. LUCKEY,
United States Attorney
for the District of Oregon;

/s/ VICTOR E. HARR,
Ass't. United States Attorney
of Attorneys for Appellant.

/s/ JOHN D. RYAN,
Of Attorneys for Appellee.

It Is So Ordered:

.....,
Judge.

[Endorsed]: Filed February 1, 1955.

In the United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
vs. Appellant,

AMOS R. MORIN, Appellee.

APPELLANT'S BRIEF

On Appeal from the United States District Court
for the District of Oregon

C. E. LUCKEY,
United States Attorney for the District of Oregon

VICTOR E. HARR,
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FILED

APR 27 1955

PAUL P. O'BRIEN, CLERK

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In the United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
vs. Appellant,
AMOS R. MORIN, Appellee.

APPELLANT'S BRIEF

On Appeal from the United States District Court
for the District of Oregon

JURISDICTION

Appellee brought action for compensation for damages claimed sustained by the plaintiff as a result of alleged negligent medical treatment by the U. S. Public Health Service and its agents. Appellee demanded the reasonable value of services of physicians and surgeons, hospital expense, medicines and loss of wages. Recovery was sought under the Federal Tort Claims Act.

Appellee filed this complaint in the United States District Court for the District of Oregon November 17, 1953 (Tr. 3). Appellant answered July 1, 1954 (Tr. 7). A pre-

trial order was prepared, submitted and approved by the Court, and the case proceeded to trial before the Honorable Claude McColloch, the United States District Judge for the District of Oregon, July 21, 1954. On August 4, 1954 the Court entered a Memorandum of Opinion (Tr. 22). August 10, 1954 the Court made and entered its findings of fact and conclusions of law (Tr. 23 to 27). Judgment was made and entered in favor of Appellee on August 26, 1954 (Tr. 27 and 28). Notice of appeal was filed with the Clerk of the United States District Court for the District of Oregon October 25, 1954 (Tr. 29).

Jurisdiction over this action existed in the District Court under 42 USC Sec. 249, 28 Stat. 696, as amended, and 28 USC Sec. 1346(b), 62 Stat. 933, as amended.

STATEMENT OF THE CASE

Plaintiff Morin was at the times herein concerned employed by the Corps of Engineers, United States Army, as a seaman (third mate) aboard a public vessel used primarily as a river dredge. On June 10, 1952, he was on annual leave and engaged in painting his residence, on a ladder. About 12:30 P. M. the ladder slipped and fell with plaintiff to the ground, and the plaintiff landed in a sitting position. In the fall, plaintiff suffered a severe compression fracture of a lumbar vertebra, and a comminuted compound fracture of his lower left leg. Plaintiff, immobilized by the fall,

called his two teen-age sons for assistance, and they at once procured medical assistance from a physician who lived nearby. This physician, Dr. Doane, noted plaintiff's condition and distress and administered morphine before removal of the plaintiff by ambulance. The ambulance driver was directed by the plaintiff to go to Physicians & Surgeons Hospital, which the plaintiff knew had a contract with the U. S. Public Health Service from which Service the plaintiff was entitled to medical care as a seaman. Plaintiff also carried Blue Cross Insurance, and was a navy veteran.

Plaintiff was admitted to the emergency surgery of that hospital shortly after 1:00 P. M. and given initial examination, antiseptic cleansing, antibiotics, and morphine for pain. He was X-rayed, and the leg splinted and immobilized by heavy bandaging. This initial care was by a resident physician at the hospital, Dr. C. O. Schneider, who promptly contacted by telephone Dr. Lee A. Craig, Jr., a staff physician of the U. S. Public Health Service in Portland, Oregon, who advised him the case would be directed to Dr. John B. Leonard, a general surgeon in Portland, Oregon, and part-time contract consultant with the U. S. Public Health Service. Dr. Leonard was promptly notified of this employment and of the patient's condition.

Because of plaintiff's pain and distress and general injuries and condition, Dr. Schneider was concerned about the danger of shock to the patient, who had symptoms of

potential shock. In the judgment of the attending physicians, rest and improvement of the plaintiff's general condition were of greater importance than immediate reduction of the leg fractures. By consultation of the attending physicians, including Dr. Leonard, Dr. Craig, and Dr. A. T. Morrison, who was the physician in charge of the U. S. Public Health Service in Portland, on the day following the accident, it was determined that the patient should on the morning of June 12th, the next day, be taken to the U. S. Marine Hospital in Seattle, Washington by ambulance for subsequent surgical care and hospitalization. This was done and the patient after about a four hour ride in a well-equipped late model ambulance, was delivered to the Seattle hospital about noon, and promptly taken to surgery. His leg bones were set, a leg cast and a body cast applied. The lacerations to his shin, being about an inch and one and one-half inches in length, respectively, were sutured at that time, and about 10 days thereafter the leg cast was windowed, and the lacerations appeared completely healed. There was, however, crepitation in the bones, and because they had not knit, open reduction of the fractures was determined upon. On July 5, 1952, for that purpose, a sliding bone graft was surgically performed and an Eggers plate applied to the shin bone. Thereafter, the incision healed slowly. Plaintiff was discontented in Seattle, although no complaint is made about the excellence of his care there, and left the hospital August 17, 1952, against advice, and returned in the family

automobile, operated by his wife, to Portland and sought treatment by his family physician, Dr. Thorup, who associated Dr. Cherry as orthopedic consultant. Plaintiff, August 24 to 28, 1952 was hospitalized in the Providence Hospital in Portland, and Dr. Cherry put the patient under an anesthetic and by asserting pressure to the side of the fracture, tried to straighten a small angulation in the tibia. The leg was then casted and pressure applied to the cast to effect further bone straightening.

Plaintiff November 5, 1952, returned to the U. S. Public Health Service in Portland as an out-patient. On December 8, 1952, plaintiff returned to his job aboard the dredge. At this time the bone had knit and was solid, and the incision which had previously had some drainage completely healed. Plaintiff was given light tasks and continued to work until January 22, 1953, when he returned to the care of Dr. Cherry, and was hospitalized in Providence Hospital in Portland, January 24, 1953, for the removal of a piece of dead bone—a sequestrum—at which time Dr. Cherry stated he also removed a small amount of pus, and one week later operated and removed the Eggers plate and screws. His condition was then appraised to be osteomyelitis and thereafter he had drainage in the affected area of the left leg, which progressively increased. April 25, 1953, he was hospitalized in the U. S. Veterans Hospital in Portland, Oregon. The osteomyelitis was there given effective treatment and a series of skin grafts accomplished. Plaintiff was

discharged from the Veterans Hospital in March, 1954, the records indicating complete cure. The last period of hospitalization was intermittent, broken by furloughs.

Plaintiff's claim for damages, as summarized in the pre-trial order was: \$65,000.00, general damages; loss of wages, \$6,388.32; and medical and surgical expenses of \$523.75. The trial judge awarded plaintiff \$45,000.00 general damages; \$4,711 special damages, and his costs incurred in the action.

Plaintiff claims that the above damages were the result of negligent treatment accorded him by the agents and staff of the U. S. Public Health Service from the time of his entry at the Physicians & Surgeons Hospital and his removal to Seattle, a period of about 48 hours.

STATEMENT OF POINTS RELIED UPON

The points relied upon by the United States (T.R. 399-400) are:

1. The evidence in the case fails to establish that there was any deficiency in the treatment accorded appellee in the Physicians & Surgeons Hospital at Portland, Oregon.
2. If there was a deficiency in the treatment accorded appellee as charged, the evidence fails to establish that it was the direct and proximate cause of appellee's osteomyelitis, or the residual disability, pain and suffering resulting therefrom.

3. The Court erred in finding that appellant, in treating appellee, did so in a negligent, careless manner proximately causing injuries to appellee, by failing to render appellee immediate, adequate and proper medical and surgical treatment, cleanse debridement and closure of wounds at the site of the fracture of the left tibia.
4. The Court erred in finding that appellant, in treating appellee, failed to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon, and like communities in the treatment of the comminuted compound fracture of the left tibia.
5. The Court erred in rendering a verdict in favor of appellee and against appellant because there was no substantial evidence to support said verdict.
6. The District Court erred in making and entering its Judgment, dated August 26, 1954, herein appealed from, by ordering, adjudging and decreeing judgment in favor of appellee herein and against the United States of America, appellant herein, for the reasons set forth in specification of errors Nos. 1 to 5, inclusive, herein designated.
7. That the verdict as rendered by the District Court was excessive.
8. The District Court erred in finding that appellee would be required to undergo further operations.

ARGUMENTS IN SUPPORT OF POINTS ONE AND
THREE OF APPELLANT'S ASSIGNMENT
OF ERRORS

The basis of support of these assignments of error are primarily factual in nature. Perhaps the answer lies primarily in the treatment afforded to appellee by Dr. Constantine Otto Schneider, the resident physician of the Physicians & Surgeons Hospital. Dr. Schneider had completed his internship in one of the better hospitals in the west, the Anckor Hospital in St. Paul, Minnesota. It was a hospital perhaps twice as large as any general hospital in the City of Portland, Oregon. To it were sent most of the emergency cases arising in the city of St. Paul, Minnesota.

We contend that the emergency care given to appellee by Dr. Schneider was correct and adequate in every respect. This care embraced the cleaning of the wound, dressing it so that it would not become contaminated, immobilizing it by splinting and bandaging, the taking of the necessary X-rays and putting him to bed for rest as quickly as possible. To view this case clearly, we should try to view it through the eyes of Dr. Schneider as the appellee was brought into the emergency surgery. First there is the history of the case as given to the nurse and to Dr. Schneider that the appellee had fallen approximately 20 feet (Pltfs. Exh. No. 1, pg 19) from the ladder from which he was painting his house. He landed on his back at the edge of a cement sidewalk. When

admitted to emergency surgery, although sedated, appellee's pain was very severe, with complaints directed primarily to his back. Dr. Schneider's concern is concisely stated when he said:

"I think my primary consideration in this case was to relieve his pain, because the patient was extremely disturbed and complaining of a great deal (Tr-107) of pain in his back, and alleviation of pain of course controls shock."

Also:

"Of course my primary care was shock, because death can result from shock. My secondary consideration was the possibility of a back fracture which might result in dissection of the cord, and, therefore a complete paralysis." (Tr-108)

Further, with reference to the first examination by Dr. Schneider, you have this testimony:

A: "As soon as we had him on the table and had given the medication I described and had done the blood pressure, pulse and respiration and had checked his wound superficially, I tried to determine the extent of his injuries.

"On examination we found a couple of small lacerations and a large abrasion in the left leg with palpable crepitus. As I remember, the bone was visible through the wound or wounds.

"We examined him somewhat in reference to his back, but his pain was so severe that we did not want to manipulate it too much at that time." (Tr-79)

In several places in the transcript Dr. Schneider testified about the cleansing of this wound. A part of his testimony in this regard is as follows:

Q: "Then you testified as to the detergent and mild antiseptic used. In what area or over what area did you use that antiseptic and detergent?"

A: "I used that around the area immediately surrounding the open wound, and then attempted to wash out any bacteria or contamination that might be present. (Tr-111). . . .

Q: "You first cleaned the abrasion?"

A: "Yes. Then we poured some of the saline solution, (Tr-111) as I remember it, all over the wound in an attempt to clean it; that is, to wash out any dirt or bacteria that might be present. After it was thoroughly cleaned, then we applied a large compression dressing over it.

Q: "Counsel asked you something about excising the wound or about debridement.

A: "By strict definition, debridement involves removing of foreign matter and excision of all the tissues immediately surrounding the wound, after you irrigate the wound and wash the dirt out of it.

Q: "Was there any such tissue in this case, as far as you recall, that needed to be excised?"

A: "To the best of my recollection, no, there wasn't. I couldn't find any. The wounds were small, and there didn't appear to be any." (Tr-112)

Following the cleansing of the wound, Dr. Schneider proceeded to dress it which process he described as follows:

"Compression dressing consists of dry, sterile dressing applied directly over the wound; then the entire leg is wrapped in what we call compression cotton, which is a heavy, bulky cotton, you might say; the compression cotton is thoroughly wrapped on and then Ace bandages applied to maintain compression of the leg, to prevent bleeding and to prevent swelling." (Tr-83)

After X-rays were taken of the appellee's leg and back he was then put to bed, his leg elevated on pillows to help control the swelling and bleeding and the back was put in hyperextension, that is, it was elevated. (Tr-113) Dr. Schneider testified that generally patients with compression fractures of the spine are placed in hyperextension to help prevent any possibility of bad effects to the spine.

Plaintiff's Exhibit No. 1, page 8, contains Dr. Schneider's written orders for care of Mr. Morin. The first directive was for penicillin to prevent infection. The other orders and their purpose is stated by Dr. Schneider as follows:

"The second order is for morphine sulphate, for pain, given to help allay shock. In this particular case I ordered a complete blood count and, to avoid shock, I ordered that they have blood available. Sedation was indicated and I ordered Sedamyl. I ordered Deprapanex, 4 cc's, intermuscular. That is a gentle bowel stimulant, given to allay ileus. I ordered general diet as tolerated but none until Dr. Leonard gives his OK." (Tr-88)

Appellee's medical expert said as to these orders, "Those are standard, excellent practices." (Tr-220)

These orders were all carried out except that shock being avoided there was no blood transfusion necessary. Mr. Morin did develop ileus as was expected. He remained in Physicians & Surgeons Hospital until 8 o'clock A.M., June 12, 1952, when he was transported to Seattle via ambulance.

Dr. John E. Leonard, general surgeon and consultant in charge of this case, testified as follows:

"Naturally my memory has been refreshed by Dr. Schneider talking to me and telling me he called me, and if he had not called me he would not have said so.

* * * * *

A: "It is my own personal opinion that the treatment of this man at that time was very adequate and excellent.

"I would like to go just a step further and say that if I ever have a compound fracture and a broken back at the same time, I would not want any different treatment than was accorded in this case to this man.

"Of course, I understand fractures sometimes are treated in different ways.

Q: "Yes, fractures sometimes are treated in different ways, and there is a respectable segment of the medical profession who feel the wound must be closed within six to eight hours. Do you subscribe entirely to those views?

A: "No, I don't. I think every case is an individual case and you must observe it and treat it accordingly. You must prepare yourself for certain things that might happen.

"I think anybody who has had an injury like this (Tr-294) man sustained has had about all he should have in one day. I never have believed in this immediate setting of fractures.

"However, that is my own personal opinion and I have seen lots of fractures, and it is my own personal opinion that would certainly add to his shock.

"A man might be holding his own and be in pretty good shape, in better shape than you would really believe, but I have always felt—and again this is my own opinion over several years—that he is standing up pretty well under the present load and if you add a little more burden to it you could push him into shock, shock of different degrees.

"Also I certainly do not subscribe to the reasoning that a fracture should be set immediately. I do not think that is necessary. That again is my own personal opinion." (Tr-295)

A doctor must exercise the highest order of discretion in determining what is best for his patient. To have taken this man to surgery would have necessitated the administration of an anaesthetic. General anesthesia, textbooks say, is or can be the cause of shock (Tr-115). Dr. Berg, orthopedic specialist, said: "Well, of course you don't like

to add further shock to him. Anaesthesia is a shock too.” (Tr-360)

Although Dr. Leonard has no recollection of discussing this case with Dr. Schneider on June 10, 1952, there is this circumstance which would indicate that he was consulted about the man's condition. Dr. Schneider's order sheet (Plaintiff's Exhibit No. 1, page 8), says:

“General Diet as Tolerated—but none until Dr. Leonard gives OK.”

The bedside notes (Plaintiff's Exhibit No. 1, page 10), show that on June 10, 1952, at 5:45 P.M. the patient “refused diet”. Bedside notes, page 10a, show on the morning of June 11, prior to the time that Dr. Leonard visited the patient, an entry “Light diet. Fed—ate fair.” From this we must assume that Dr. Schneider's instruction had been complied with and that Dr. Leonard did okay the diet of appellee. It must also be assumed then that he had full knowledge of the case to the extent that Dr. Schneider was able to inform him.

The Court having found appellant negligent in failing to render to appellee immediate, adequate and proper medical and surgical treatment; cleanse debridement and closure of the wounds at the site of said comminuted compound fracture of the left tibia, proximately causing his later suffering, infection of the bone of the tibia, etc., we must then analyze appellee's testimony and determine where they take

issue with us in the treatment that we rendered this patient. These accusations of negligence come entirely from the testimony of Dr. Howard L. Cherry, plaintiff's physician. Pertinent portions of his testimony are set forth as follows:

"I would say if there had been only one gross error in his treatment, I would say the lack of adequate, immediate care, nothing else, is of enough significance to be of extreme importance to me. . . ." (Tr-245)

And again:

"Let me say this: there are a hundred ways of treating a fracture; but if it is a compound fracture, it should start with very adequate cleaning of the debris and closing the wound, if possible, and from there on in they can be treated in many ways."

Again Dr. Cherry stated:

"The proper treatment, in my opinion—and I believe it is shared now universally—is that this wound (Tr-240) should be very carefully examined, carefully cleaned, to its depth, reduced if possible, and the wound closed. If there is any foreign material anywhere, it should be removed. If there is devitalized tissue anywhere, it should be removed.

"The time element is of extreme importance. We figure that what we call the golden time in the treatment of fractures, compound fractures, is from six to eight hours. . . ." (Tr-241)

This testimony of Dr. Cherry should be considered in the light of one of plaintiff's exhibits, being Plaintiff's Ex-

hibit No. 13 set forth on page 375 of the transcript, entitled "Campbell's Operative Orthopedics", which is Dr. Cherry's own medical textbook. Because of the importance of some of the language contained in this book, following are two paragraphs appearing at Tr-375 and Tr-376.

"... The object of emergency treatment is the conversion of a contaminated wound to a clean wound . . . and the conversion of a potentially infected open fracture to a healed, closed one. Treatment of the fractured bone is secondary to the prevention of infection.

The first consideration is the patient's general condition. Emergency measures . . . are frequently necessary to combat pain, hemorrhage and shock; thereafter, attention is directed to the local condition. From the time of injury until the patient is ready for the local preparation, the wound should be protected by a dressing and the extremity splinted." (Tr-376)

In the same textbook (Tr-377) the various types of wounds are classified into three types. Dr. John E. Leonard, in testifying for appellant, classified the lacerated wounds as being Type 1 (Tr-300), whereas Dr. Cherry classified the wounds as Type 2. It is significant, however, that Dr. Cherry in answer to a question "Could it be that your opinion might be wrong?", replied, "Yes, I have heard quite a little discussion about this." (Tr-271) This same medical text (Tr-379) states as to Type 1 that a preliminary cleansing is usually sufficient.

The above quoted paragraphs from the medical textbook referred to by Dr. Cherry are undoubtedly the most widely accepted method of treatment of compound fractures. It is the contention of appellant that Mr. Morin was treated in exactly the fashion recommended in this medical text. There is only one man who has personal knowledge of the cleaning of this wound. He has testified as plaintiff's witness that the wound and the abraded area around the wound were thoroughly cleaned. There is no competent evidence that can in any way refute this testimony.

Medicine is not an exact science and it calls for the exercising of discretion of the very highest order. Physicians do not insure cure. In this particular case it was the determination of those doctors having knowledge of the condition of Mr. Morin that it would be to his best interest to put him to bed for rest after first cleansing the wound and making it a clean wound rather than a potentially contaminated one. Appellee must of course destroy Dr. Schneider's testimony pertaining to the cleansing of the wound. It is no doubt a fair statement to say that Dr. Cherry is not disinterested and his testimony as an attending doctor and his opinions as a specialist in many respects have been shown to be colored. Some of his own practices which he carried out in his treatment of this patient were criticized and under attack and he felt called upon to explain them to a certain extent. In other places in his testimony he has definitely shown himself to be biased and prejudiced. Later on in this

brief it will be shown that his testimony in many respects was greatly exaggerated. Talking about Dr. Schneider, who claims the wound was thoroughly cleaned, he says in part:

"I don't know your Dr. Schneider. I don't know him when I see him at all, but anyone who had had adequate training and had seen compound (Tr-263) fractures should know that you don't treat them *by wiping something over them and putting a dressing on them* . . ." (Emphasis Added) (Tr-264)

Again, speaking about Dr. Schneider and the emergency treatment rendered by him, Dr. Cherry said:

"I would say he gouged out the wound" (Tr-267)
Regarding Mr. Morin going to USPHS at Seattle, he said:

"... I think it was very much to his benefit to go up there and get a doctor, yes, rather than just lie here. . . ." (Tr-275)

It seems very obvious that Dr. Cherry found it necessary to take issue with Dr. Schneider on the cleansing of Mr. Morin's lacerated leg. If he were to admit that the emergency treatment was adequate then appellee's case is lost, for Dr. Cherry admits that after adequately cleaning a wound:

"... There are a hundred ways of treating a fracture; but if it is a compound fracture, it should start

with very adequate cleaning of the debris and closing of the wound, if possible, and from there on in they can be treated in many ways." (Tr-269)

Appellant does not disagree with the aforesaid statement or with the quotations aforesaid of the medical text. What appellant tried to do was to cleanse the wound and convert it from a potentially infected wound to a closed, clean one. Until Mr. Morin's condition became stabilized so that the fracture could be reduced, the wound was protected with sterile dressing. Dr. Schneider's appraisal was that the patient at the time was in impending or incipient shock (Tr-114). This was confirmed by Dr. Cherry several times. In illustration, Dr. Cherry said, "This man, as illustrated by the chart, was not himself. There was danger of going into shock." (Tr-262). Again, he said, "I would say this, that with these injuries, these potentials, he very well might have gone into shock. . ." (Tr-266). With anaesthesia, itself a shock, it would surely be discretionary with the attending doctor to determine if he wished to subject his patient to further shock by administering anaesthesia and reducing the fracture, or, in the alternative, to give him bed rest and await stabilization of his condition. If it was discretionary, as aforesaid, to delay surgery, and, instead, treat his general condition, then there is left but one issue—was Dr. Schneider negligent in the cleaning, splinting and bandaging of the wound of Mr. Morin's lower left leg?

The finding of the court that appellant was negligent and careless in failing to render to appellee immediate and adequate, proper medical and surgical treatment; cleanse debridement and closure of the wounds at the site of said comminuted compound fracture of the left fibia, appears clearly erroneous in that it is unsupported by any substantial evidence whatsoever and is contrary to the great weight of the evidence. *Sbicca-Del Mac. Inc., v. Milius Shoe Co.* (CCA 9), 145 F 2d 389, 395. Appellee's evidence condemning the emergency treatment and the treatment rendered at the Physicians and Surgeons Hospital at Portland, Oregon, was not such evidence as a reasonable mind would accept as adequate to support a conclusion of the court of plaintiff's negligence as heretofore set forth. *Edison Co. v. Labor Board*, 305 U.S. 197, 227. The type and the weight of the evidence submitted on behalf of appellee in support of the finding aforesaid is such that the reviewing court herein should be left with a definite and firm conviction that the lower court committed a mistake in finding as it did and that said finding was clearly erroneous. *U. S. v. U. S. Gypsum Co.*, 333 U.S. 364, reh. den. 333 U.S. 869.

In support of the proposition that an attending doctor will not be liable for an error in judgment see *Hills vs. Shaw*, 69 Ore. 460, 467, where the Court stated in part:

"The substance of the doctrine taught by these cases that if a regularly licensed physician with reasonable diligence employs the skill with which he is

possessed in treating a surgical case, he is not liable for an error in judgment, and that the mere fact that an untoward result ensues is not in any sense evidence of negligence. There are so many elements combating the surgeon in his efforts to restore a patient to bodily soundness that he can do no more than exercise his skill and judgment to accomplish the desired result. . .”

In *Grace Bros., Inc. vs. Commissioner of Internal Revenue Commission*, 173 F. 2nd 170 (9 CCA) under Federal Rule that findings of fact shall not be set aside unless clearly erroneous, findings are to be given the effect which they formerly had in equity.

In an equity case decided by the Supreme Court of Oregon entitled *In Re De Lin's Estate, Richards, et al vs. De Lin, et al*, 135 Ore. 8, where the Court had occasion to evaluate testimony of an expert medical witness based on hypothetical questions as compared to positive testimony of the physician who treated testatrix. The Court said at pages 13 and 14:

“The evidence on behalf of contestants is contradictory of the evidence adduced by proponents. After carefully weighing all of the evidence, we are persuaded that the weight of the evidence is decidedly in favor of the proponents. We cannot give to expert testimony based on hypothetical questions the same weight we do to the direct and positive testimony of the doctor who treated testate. . . .”

In the case of *Equitable Life Assurance Society of the U. S. vs. Ireland*, 123 F. 2nd 462, 465 (CCA 9), this Court said,

"... The evidenciary value of the opinion (expert medical witness) is so inconsiderable as to render it worthless for all practical purposes; and the fact that it was given orally does not require that a viewing Court to accept it as adding to the weight of the finding below."

Throughout this case we have seriously and earnestly maintained that the initial emergency care given by Dr. Schneider embraced a cleaning of the wound which Dr. Schneider in his best judgment was, he considered, thorough and complete. We further maintain that while Dr. Cherry violently disputes this statement and maintains there was no cleaning whatsoever of the wound, his disagreement has no basis whatsoever in fact. Since there was no contradiction worthy of consideration in this case regarding Dr. Schneider's treatment, nor was Dr. Schneider impeached, it would appear the statement of this Court in the case of *Grace Bros. vs. Commissioner of Internal Revenue*, *Supra*, is in point:

"It is axiomatic that uncontradicted testimony must be followed. Citing cases . . ."

The appellee had the obligation to establish his case by a preponderance of the evidence. We submit the evidence produced does not meet this requirement.

ARGUMENT IN SUPPORT OF POINTS TWO AND FIVE OF ITS ASSIGNMENTS OF ERROR

The undisputed testimony in this case is that the lacerations sustained in this accident were completely healed by July 5, 1952 (Tr-318); that the wound some ten or eleven days thereafter was still clean (Tr-328), and there being no evidence of infection in this wound and in order to hold the bones of the left tibia in apposition, Dr. Paul Walker did a sliding bone graft and put in an Egger's plate. The setting of the bone on June 12, 1952, by manipulation had not held up in that the bones had not stayed in an end to end position and had become displaced. (Tr-328) Dr. Paul Walker, the chief surgical and medical director of the United States Marine Hospital in Seattle, Washington, personally performed this operation. During the operation Dr. Walker took fragments of bone and tissue and gave them to the chief pathologist at the hospital, who was also the associate professor of pathology at the University of Washington Medical School, who microscopically examined these particles of bone and tissue and reported that there was no evidence of osteomyelitis in the tissue submitted. (Tr-330) There was no significant temperature rise in this man throughout his hospital stay after the first four or five days from the first operation and about four days from the second operation. (Tr-330) The significance of the fact of there being no temperature rise is that if there is no upward trend of the temperature then there is no in-

fection in any degree whatsoever. (Tr-330) See also Dr. Warren C. Hunter's supporting testimony. (Tr-354)

Any contamination that might have entered the lacerated wound would have manifested itself very quickly because skin over the tibia is thin. From the testimony thus far discussed, we have seen that the lacerations had healed cleanly by July 5, 1952, and that specimens taken from the wound itself on July 11, 1952, and viewed microscopically by the pathologist, were negative as far as showing any infectious bacteria. This proof negatives any claim that the wound became infected in Portland, Oregon, while the appellee was in the Physicians & Surgeons Hospital.

After the sliding bone graft and the plating of the fractured bone the incisional wound was slow to heal. Appellee apparently felt that he was not making the progress that he had hoped for and, being away from his home and family, elected to leave the U. S. Public Health Hospital in Seattle on August 13, 1952, against the advice of the hospital doctors and authorities. However, appellee left after stating in writing that he had knowledge that he still had an open wound in the lower left leg and that there was danger of the bone under the wound becoming infected. Appellee in said writing absolved the U. S. Public Health Service Hospital in Seattle and its staff from any responsibility in connection with his injuries, and from responsibility with regard to the outcome of those injuries. (Pltf's Exh. No. 3, page 70)

When appellee left the Seattle hospital his incisional wound was healing by granulation and there was a slight drainage from the wound. There was, however, no gross infection. By gross infection is meant infection that can be seen. (Dr. William R. King, Tr-320). Dr. King further testified that there was an open wound in this case and that there was serous drainage. Dr. Walker explained that whenever there is granulating tissue there will always be serous drainage, and that a granulating wound is healing by secondary process, that is, it is healing from the bottom up. (Tr-332)

Plaintiff returned to Portland and contacted his own doctor, Dr. Thorup, who called in Dr. Cherry as consultant. On August 24, 1952, appellee went to Providence Hospital, where his history was taken and he underwent surgery under general anaesthetic by Dr. Cherry, who performed a manipulation of appellee's fractured leg to straighten an angulation of the bone. Dr. Cherry offered this testimony as to his description of appellee's wound when he first saw him. The following statement is significant in this part of Dr. Cherry's testimony. Referring to some of the treatment rendered at Seattle, he said:

"... They put the plate and screws and bone clamp across this fracture and then they nursed it along. The wound was slow to heal. It gaped a little for quite a while but finally it *did heal almost entirely* and that is the time when he came down to us." (Tr-248) (Emphasis added)

And again he stated:

"It had a slight amount of drainage. . ." (Tr-204)

At this point, however, we run headlong into opposing testimony as given by plaintiff's expert witness, Dr. Cherry, pertaining to drainage. He says:

"Drainage is due to bacteria, to a bacterial infection, which is present in a wound, essentially pus." (Tr-210)

Dr. Walker took serious issue on this point. He testified that Dr. Cherry wouldn't really know whether there was infection or not in the absence of a culture. He stated that pus can be sterile; and, "it doesn't have to have organisms in it to have pus." (Tr-337)

Then Dr. Cherry proceeded to testify as to his great concern about the condition of this wound. He described the condition of the wound as he first saw it many times in his testimony and his description each time varied somewhat. The following are some of his observations:

"There was drainage present; there was a crusting on the wound; the skin was discolored and warmer than normal; its appearance was not normal. It looked critical, that the entire thing might break down. In answer to your question, the answer is, yes, there was infection present. It was not enough at that particular time to make him sick, but it was very unhealthy tissue and there was some infection present, and there was

enough that we were much concerned about it." (Tr-206)

"It just had the appearance that it probably would not hold up." (Tr-207)

"We were scared, for it was critical and we thought it might not go ahead and heal, which it subsequently did not do. . ." (Tr-211)

Dr. Cherry's testimony must have been based on his personal recollection rather than on records maintained in his office, or records at the Providence Hospital where the plaintiff was taken. Dr. Cherry was requested to produce his office records, and Plaintiff's Exhibit No. 12 represents what purports to be his office records. Plaintiff's Exhibit No. 6 is the Providence Hospital records on this case. Particular reference is here made to the personal history and physical examination record as made by Dr. S. R. Hevel, dated August 24, 1952, and a part of the Providence Hospital records. A part of the history pertaining to Mr. Morin is as follows:

". . . This forty-four year white male was last well June 10, 1952, when he fell from ladder at home sustaining compound fractures, left tibia and fibula, lower third. Treated for two days—then simple closure and manipulation reduction. Unsuccessful — plated—split skin—*healing at present*. Reduction still said to be inadequate. Also compression fracture L2—body cast for nine weeks—no symptoms now." (Emphasis added)

Under heading "Physical Examination", under Symbol NMO:

"Long leg cast, left, incision over lower tibia granulating. Signed J. M. Thorup (Plaintiff's personal physician)".

Again "Progress Record", dated August 24, 1952:

"Forty-four year white male compound fractures of left tibia and fibula *granulating*. Old open reduction incisional line. . ." (Emphasis added)

Dr. Cherry explained what was meant by granulating wound. He said that it is a wound not yet healed and that granulation is the process of attempting to heal. (Tr-210 and Tr-256)

Defendant's witness, Dr. Walker, explained that healing by granulation tissue is secondary healing; a granulating wound is a clean wound and is healing from the bottom up. It would certainly appear that if this wound was in the critical condition described by Dr. Cherry, and if there were actual infection present, these hospital records somewhere would make some reference to this condition. Must we assume therefore that Dr. Hevel and Dr. Thorup were remiss in their duty; that they neglected to record on the hospital records what the true facts were?

Dr. Cherry certainly made it abundantly clear that he wanted the trial judge to believe that this wound on the left tibia was in a very bad condition; that it was critical;

that it was infected; and the following quotation from the record should make it crystal clear what Dr. Cherry would have us believe:

Q: "You said it was open when he came down from Seattle?"

A: "It was open, because pus was draining out of it; the bugs were going out, not in."

Q: "Does that mean that was osteomyelitis simply because there was some drainage coming out?"

A: "No, I didn't say that."

Q: "Was there osteomyelitis, doctor?"

A: "There was osteomyelitis, very definitely, and I had specimens taken at the time I took the plate out. He had soft tissue infection and possibly osteomyelitis before that." (Tr-251)

The last answer aforesaid is, of course, inaccurate in that the entire record otherwise refutes that Dr. Cherry ever did have any specimens taken when he took the plate out, which was in February, 1953, and in fact, it is testified to elsewhere in the case that it was practically a universal practice that doctors everywhere have specimens taken and that they are examined microscopically. It seems unbelievable that Dr. Cherry, an orthopedic specialist, would have violated such a rule. What Dr. Cherry actually did was to

turn over to the pathologist the Egger's plate and screws to be identified as such. See pathologist's report (Pltfs Exh. No. 6) also (Cherry Tr-258). It is not understood why Dr. Cherry, in giving the aforementioned testimony, said that he had specimens taken and that it definitely was osteomyelitis. This, of course, carried the implication that there was such a pathologist's finding, when in fact there was no such report or finding. We submit the last answer of Dr. Cherry, stating that the patient had soft tissue infection and possibly osteomyelitis before "that", referring to the time when he took the plate out on February 2, 1953. This answer was, that there was "... *possibly* osteomyelitis started in this leg." Appellant maintains that no one knows how or when the infection or osteomyelitis started. Any doctor who attempts to pinpoint the beginning of the trouble here or the cause of the infection that eventually resulted is certainly speculating as to the cause and source. Quoting again from Dr. Cherry's testimony when reference was made to the man's condition upon being brought down from Seattle, Dr. Cherry was asked:

Q: "Are you able to say that there was an active infection in there?"

A: "There was infection."

Q: "That was osteomyelitis?"

A: "I can't prove it as osteomyelitis at that time."

Q: "Then did you take the risk of manipulating these bones without knowing whether or not it was osteomyelitis?

A: "If there were osteomyelitis present, it would not hurt it to manipulate it to the degree that I did."
(Tr-252)

It seems inconceivable that this leg was in the critical condition as testified to by Dr. Cherry, or that there was any infection such as he would have us believe. The other testimony in the case makes it incredible that Dr. Cherry, who undoubtedly is a good doctor, in the face of an active infection and possible osteomyelitis at that time according to his answer aforesaid, would take the risk of activating and spreading an infection by manipulating this bone. This procedure was not a minor thing, as is shown by the hospital record here. The Providence Hospital records (Pltfs Exh. No. 6) show that four days of hospital care and attention was thought necessary to restore his condition and enable his discharge on August 28, 1952. He was under a general anaesthetic at the time of this manipulation. Also to be considered is the fact that the fractured leg where the tibia was splintered was being protected by a plate and four screws and any pushing around of this nearly healed fractured bone would probably affect the plate as it was fixed to the bone and alter and modify or change in some way its fixation to the bone proper. With reference to this manipulation, Dr. Paul Walker, head of the U. S. Public

Health Service Hospital in Seattle, Washington, a member of the National Board of General Surgeons and apparently a very capable surgeon, had this to say about this manipulation:

“One reason I would not have manipulated it is because if he already had an infection he was certainly asking for trouble by manipulating it under a general anaesthesia, and it must have been quite a manipulation, because apparently considerable force was used.”
(Tr-336)

If there actually was infection in the wound at that time, manipulation could have been the direct cause of it becoming activated. This is the direct testimony of Dr. Warren C. Hunter, the leading pathologist of Oregon (Tr-353), and of Dr. Richard F. Berg, orthopedist. (Tr-361)

It appears that Dr. Cherry was mistaken when he testified that at that time there was infection in this wound. His testimony is inconsistent in this respect. As previously pointed out, he testified that when plaintiff came down from Seattle, his wound was nearly healed. At a later point he said that there was a slight amount of drainage. That seems inconsistent with his other statements—that the “pus was draining out, and the bugs were going out, not in”, and again, “There was infection. I can’t prove it was osteomyelitis at that time.”

Appellant states the fact to be that there was an open wound at the time and that there was some drainage, but

that it was not infectious. That position is supported, as aforesaid, by the records at the Providence Hospital where there is absolutely no reference whatsoever to any infection. Now Dr. Cherry testified *that he continued to see the plaintiff at regular intervals thereafter and that he checked him by having X-rays and changing of the cast as needed until the fracture was solid, and that he continued to observe the wound and that it actually gradually got worse until "we had to rehospitalize him for further treatment on January 24, 1953."* (Tr-207) (Emphasis added). It appears that the records will not support Dr. Cherry in this line of testimony. For a while, following plaintiff's arrival in Portland, there probably was some drainage. On September 10, 1952, when plaintiff went to the Providence Hospital as an out-patient for a change of his cast, there appears on the records a notation: "Dressing was changed through a window in the cast." Again on October 23, 1952, there is the notation "Beltman's gauze dressing applied, tensor bandage applied." (Plfs Exh. No. 6) It is probable this change of dressing was because of some drainage from the wound. If there were any further treatment rendered the plaintiff at either the Providence Hospital or in Dr. Cherry's office, one would expect to find some record of it. Dr. Cherry was critical of the records of the Physicians & Surgeons Hospital in Portland, where plaintiff was first confined. It was reasonable to expect him to be able to show from his own records what treatment he rendered. If there was infection

and progressive deterioration of the leg, his records should disclose it. Nowhere, as far as we can find, is there any reference to establish infection from the time that plaintiff first went under Dr. Cherry's care until January 24, 1953.

There is a very plausible explanation for the drainage continuing in this leg. If we will refer to Plaintiff's Exhibit No. 13, page 382 of Campbell's Operative Orthopedics, we will note this language:

"In utilizing metallic internal fixation, one must be cognizant of its disadvantages; in the majority of cases, additional trauma will be created by exposure and stripping incident to the application of the fixation material. Regardless of how inert it may be, the metal must be considered a foreign material to the normal anatomic structures. *If sepsis ensues, draining sinuses will probably continue until the metal is removed. . .*" (Emphasis added)

One of Dr. Cherry's statements would tend to support this position. In referring to drainage, he testified:

"... the plate and screws consist of foreign materials and tend to keep this going. . ." (Tr-208)

There was a great deal that Dr. Cherry could have filled in by testimony covering the period from August 24, 1952, to January 26, 1953, had he been so inclined. He stated that he continued to see this patient, but he did not tell how or why he referred Mr. Morin back to the U. S. Public Health Service, where commencing November 5, 1942 he

received treatment at the out-patient clinic on the second floor of the U. S. Courthouse in Portland, Oregon, Dr. Magid being the attending doctor. Dr. Magid's record is covered in Defendant's Exhibit No. 20. It is to be noted that Dr. Magid's testimony is clearly contrary to the testimony of Dr. Cherry as to there being an open wound during this period. (Tr-283 and Tr-286) Toward the end of Dr. Magid's treatment it is to be noted that plaintiff was up and about without any cast and with scarcely any pain. He was walking on his leg and putting his full weight on it. It is further significant that throughout Dr. Magid's notes there was no reference to any discharge or drainage from this wound. The Court will appreciate the fact that at the time these notes were made there was no suggestion of any pending lawsuit and hence considerable weight should be given to them. Dr. Magid was reporting the man's condition accurately as he saw it. Attention is invited to the notation on November 13, 1952: "X-ray shows that healing is not complete"; also to other entries calling attention to the swelling of his knee; the pain that the patient reported to him; and on November 26, 1952, he reported: "The skin is thin and atrophic looking—discoloration over interior part of tibia." It would not appear that Dr. Magid had any inclination to cover up the facts; if he had, why did he report these conditions as just noted? There is further testimony of the witness, Boris Osher, that there were no antibiotics given to Mr. Morin any time during this period.

(Tr-289). This is certainly significant, for if there were any infection and/or an open wound, antibiotics would have been a logical part of the treatment. It is further significant that the record shows that a full-duty certificate was given to plaintiff to return to work, which was done with the concurrence of Dr. Cherry. (Tr-277) Mr. Osher confirmed the statement of Dr. Magid that the wound was healed. (Tr-289).

As further evidence of the fact that this incisional wound was healed prior to December 1, 1952, there has been set forth herein as Appendix A, a reproduction of the first page of a four-page history and report of physical examination which was made of plaintiff on April 25, 1953, the date of his entry to the Veterans Hospital in Portland, Oregon. (Pltfs Exh. No. 10) This history contains the facts that the plaintiff himself gave to the person writing the record down. We would not expect to find anyone who would be more apt to have knowledge of the healing of the wound than plaintiff himself. The first sentence that is significant as shown is:

“ . . . The skin wound healed and the body cast was removed in two months. . . ”

This apparently has reference to the time that he was in Seattle, and the skin wound no doubt refers to the lacerated areas in the front of his shin bone. Farther down in the history there is the notation:

“ . . . The incision did not heal until November, 1952. . . ”

Undoubtedly at this time the plaintiff had no thought in his mind of any litigation and he was interested certainly in getting relief and getting his leg cured. Therefore, it is felt that this record must be correct—no one would know better than he as to whether or not the lacerations or the incisional wounds had in fact healed. If this statement by the plaintiff himself is true, then of course Dr. Cherry is mistaken in his testimony. It is admitted that none of the four pages of which Appendix A is the first page was signed by anyone at the Veterans Hospital. We have no knowledge as to who took this history. It was plaintiff's exhibit. It may be contended by appellee that it was taken by an intern, or by someone who could have misstated the facts. If that be the contention, then we would refer to the narrative summary as a part of the same exhibit (Pltfs Ex. No. 10), which report is next to the record referred to as Appendix A and there again will be found the same history to this extent:

“The incision for the open reduction did not heal until November, 1952, at which time the cast on the leg was removed.”

The report is signed by Dr. Jack B. Watkins, M.D., apparently one of the doctors in attendance on this case. In the same report, signed by Dr. Watkins, there is this further significant statement:

"Because of some loose screws in the tibial plate, it was removed in February, 1953, by open method and since *that time the skin has not healed in the area of the incision.*" (Emphasis added)

The Public Health Service record indicates that with the approval of Dr. Cherry appellee on December 5, 1952, was okayed for light duty. Later and on December 22, 1952, again with Dr. Cherry's approval, the appellee was given a "fit for full duty" certificate. From that time until January 24, 1953, we are informed from the testimony of appellee that he worked full time, first on the dredge Wahkiakum and later as a watchman. We have no testimony or evidence as to any treatment or care being rendered to appellee by any doctor during this period, although from Dr. Cherry's own testimony he continued to see him regularly until he was ordered to the Providence Hospital on January 24, 1953. Dr. Cherry's personal office record does not indicate any interviews or treatment from November 24, 1952, to January 24, 1953. (Tr. 373)

Plaintiff's Exhibit No. 6, being the Providence Hospital record, shows that appellee went to the hospital on January 24, 1953, and two days later on January 26, 1953, Dr. Cherry made a 1/2 inch incision over the tibia when *a small amount of pus was removed* with flakes of bone. (See Providence Hospital Operative Record dated January 26, 1953.) Here again Dr. Cherry felt impelled to paint as bad a picture as possible despite his own signature to this hospital record.

In his testimony he argued that the amount was *not* small but considerable. (Tr-257 and Tr-258).

On February 2, 1953, Dr. Cherry performed an operation removing the Egger's plate and four screws. His operative report is brief and is as follows:

"Incision was made lateral of the plate over the lower third of the tibia, carried down to the plate. Four screws and the plate removed. The bone was smoothed off. The wound was closed with interrupted silk sutures. Compression dressing of sheet wadding and tensor bandage were applied. Signed H. Cherry."

In describing the condition of this wound Dr. Cherry has emphasized that the pus extended down to and into the bone. It is to be noted that appellant's specialists indicated that they would under no circumstances operate on this man's leg if it was thus infected.

One of the dangerous things about this operation, it would seem, was that with this infected and draining wound, Dr. Cherry removed the plate and the screws, thereby creating holes in the bone where the screws had been and inviting the infection to go directly into the marrow of the bone.

The following part of Dr. Cherry's report is significant: "The wound was closed with interrupted silk sutures. . . ." In other words, with this serious osteomyelitis infection he bottled up all the infection inbedded in the wound. This is not consistent with Dr. Cherry's earlier statement when,

in emphasizing the need for early treatment of a compound fracture to avoid infection, he said there was danger in closing a wound if unattended for 24 hours; (Tr-241) in other words he tightly closed an infected wound but would leave open a wound having a possibility of infection. Does this not create a doubt that there actually was osteomyelitis on February 2, 1953?

Subsequent to the removal of the plate from appellee's leg his condition apparently deteriorated and he was referred by Dr. Cherry to the Veterans Hospital and was treated by them as set forth in Plaintiff's Exhibit No. 10.

The task devolved upon the orthopedic specialist, Dr. Cherry, to develop causation by showing that the ultimate condition of Mr. Morin was due to the alleged inattention in the hospital in Portland, Oregon, during the first six to eight hours. Such testimony as Dr. Cherry did give, attributing the present condition of Mr. Morin and the additional operations, treatment and suffering that he underwent at the Veterans Hospital to the alleged inattention, was pure speculation. Dr. Cherry has in fact admitted that the osteomyelitis could have been caused by other intervening circumstances. In testifying concerning the treatment rendered in Seattle, Dr. Cherry stated:

"The wound was closed within a matter of a very few hours after he got to Seattle. The fracture was opened one other time. Of course, I can't say that it could not possibly occur—the fracture was opened one

other time to graft it under sterile conditions. I cannot say of course it could not possibly occur." (Tr-251)

Again he testified in response to question:

Q: "For that reason it is not at all uncommon, regardless of the treatment that is given, for them to develop osteomyelitis?

A: "With the modern method, in good hands and with the giving of antibiotics, you seldom see it. You see it, yes, but not very often when they are in good hands and there is early treatment, in a clean wound like that."

It was incumbent upon appellee to show not only that there was negligent medical practice exercised in the care given Mr. Morin in Portland, Oregon, but also that because of that negligence, the wound became contaminated. He must then further prove that the said contamination remained in this wound continuously and was the proximate cause of the infection that eventually developed and which infection progressed into the bone, causing osteomyelitis.

Then appellee herein is bound by the testimony he adduced and the evidence contained in his exhibits duly admitted into evidence as follows:

1. The lacerated wounds of appellee healed by first intention in USPHS Hospital in Seattle by July 5, 1952. (Pltfs Exh. 3, p. 18a)
2. The infection resulting in osteomyelitis could have come through the bloodstream. (Tr. 250)

3. The infection resulting in osteomyelitis could have been caused by the surgery on June 12, 1952, in the USPHS Hospital in Seattle. (Tr. 251)
4. The infection resulting in osteomyelitis could have been caused by the sliding bone graft operation on July 11, 1952, in the USPHS Hospital in Seattle. (Tr. 251)
5. Appellee is also confronted with testimony of his own witness, Dr. Cherry, that the wound began progressively to deteriorate under his care, whereas it had been getting well under the care of the USPHS and was in fact practically healed when Dr. Cherry assumed charge of the case.

It will be seen as aforesaid that appellee, through his medical expert, admits that the infection to Mr. Morin and the resulting osteomyelitis could very well have been caused by other intervening causes. In this connection, there is a rule of law in the State of Oregon that when evidence leaves the case in such a situation that the jury must guess as to which of several possible causes occasioned the injury, such part of the case should be withdrawn from their consideration. In this connection see the case of *Lippold vs. Kidd*, 126 Ore. 160, 169, 269 P. 210.

"... The evidence established that the defendant had no X-ray photographs made of the plaintiff's eye. The plaintiff's testimony was to the effect that the defendant failed to make an examination of the interior of his eye with the ophthalmoscope. The foregoing established prima facie case of negligence, but negli-

gence alone is not sufficient. The plaintiff is required to go further and establish by a preponderance of the evidence that such negligence was the proximate cause of the injury for which he seeks redress in damages and prove all items of injury. And this court has on previous occasions enunciated the rule that when an alleged injury may have been due to one of several causes, any one of which may have been the sole proximate cause, there can be no recovery unless it is shown that as between the two or more causes in question, it was the negligence of the defendant which caused the injury: *Merrian v. Hamilton*, 64 Or. 476 (130 Pac. 406); *Engstrom v. Wise Dental Co.*, 97 Or. 634 (193 Pac. 187); *Spain v. O. W. R. & N. Co.*, 78 Or. 355 (153 Pac. 470, Ann. Cas. 1917E, 1104).

There can be no liability against the government in this case unless its doctors were guilty of some negligence during Mr. Morin's first hospitalization in Portland, Oregon, and which negligence was the proximate cause of the ultimate result to-wit: osteomyelitis. Proximate cause has been defined to be that which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. There has been some extremely loose language used in this case on behalf of appellee tending to prove causation. We do not believe this testimony is substantial and worthy of belief.

Appellant contends that a medical expert's opinion as to the degree of care and skill that was exercised by ap-

pellee's doctors, may be based: (1) upon his personal knowledge of the operation or treatment in issue, obtained either by attendance during such operation or treatment, or from observation of the patient thereafter, or (2) entirely upon facts set forth in a hypothetical question. Appellee does not contend that his expert had any personal knowledge of the care and attention or operation performed upon appellee in the Physicians & Surgeons Hospital in Portland, and certainly, the examination of Mr. Morin by appellee's expert, which took place several months following the initial care, would be too remote to form a basis for appraising the degree of care and skill initially given to Mr. Morin. See *Hilgedorf v. Bertschinger*, 132 Or. 641, 285 P. 819.

With reference to expert testimony based upon a hypothetical question, the leading case of *Lehman v. Knott*, 100 Or. 59, p. 70, 187 P. 1109, lays down the rule that a hypothetical question is improper if it seeks the opinion of the witness on the merits of the case, and also states generally, the requirements as to the form of the hypothetical question. Judge Bean, on page 70, stated as follows:

"As an expert is not allowed to draw inferences or conclusions of fact from the evidence, his opinion should be exact upon a hypothetical statement of fact. It is the privilege of counsel to assume any state of facts which there is any testimony tending to prove, and to have the opinion of the expert based on the facts assumed. But the testimony should tend to establish the

facts embraced in the question. If the hypothetical question is clearly exaggerated and unwarranted by any testimony in the case, an objection to it should be sustained: *Rodgers on Expert Testimony* (2 ed.), § 27. The form of the hypothetical question, whether it states facts, or puts facts hypothetically, or refers to the testimony of witnesses as being true, should be shaped so as to give the witness no occasion or opportunity to decide upon the evidence. Hypothetical questions are clearly improper if they directly seek the opinion of the witness on the merits of the case: *Rodgers on Expert Testimony* (2 ed.), § 28. In a malpractice case the question whether a physician has in a given case adopted the proper treatment is one in which the opinions of medical men may be received in evidence, and they may state whether in their opinion the treatment was proper or not, whether it was in conformity with the rules and practice of the profession: *Rodgers on Expert Testimony* (2 ed.), § 64; 22 C.J., p. 663, § 758; *Heath v. Glisan*, 3 Or. 64; *Hoener v. Koch*, 84 Ill. 408; *Taylor v. Kidd*, 72 Wash. 18 (129 Pac. 406). As the opinion evidence rule is intended to provide against the danger of invasion of the province of the jury, a court should, as far as possible, exclude the inference, conclusion, or judgment of a witness as to the ultimate fact in issue, even though the circumstances presented are such as might warrant a relaxation of the rule excluding opinions but for this circumstance. But the rule is not absolute, for it frequently occurs that the only possible or practicable method of making proof of the fact in issue is by means of opinion evidence; 22 C.J., p. 502, § 597; *Jones on Evidence* (2 ed.), p. 465, § 372."

In *Henderson v. Union Pacific RR Co.*, 189 Or. 145, p. 166, 219 P. (2d) 170, the Supreme Court of Oregon stated:

"There is considerable authority for the rule that a hypothetical question must include all the essential, undisputed facts shown by the evidence."

And again:

"It is the rule in this state, as elsewhere, that 'an expert, though thoroughly qualified as a witness, cannot be permitted to give an opinion upon facts known to him, and not communicated to the jury'; that 'no allegation can be proved by the ipse dixit opinion of any expert unless the fact or phenomena upon which he bases his opinion are disclosed either by his own testimony or that of other witnesses'. (citing cases)."

In this case, although there had been much previous testimony, particularly by Dr. Schneider, as to what he did by way of emergency treatment to Mr. Morin, these facts were not incorporated in a hypothetical question propounded to Dr. Cherry. When he was asked (Tr-240) whether or not Morin's wound had been properly treated, Dr. Cherry answered: "I would say no." This answer was predicated upon the hospital statement from Plaintiff's Exhibit No. 1, (Tr-240). Since it was not predicated on the entire treatment as testified to by plaintiff's witness, Dr. Schneider, this testimony of Dr. Cherry should not be considered as substantial.

Counsel for appellee (Tr-242) and (Tr-243), asked a further hypothetical question which was objected to because the facts were inaccurate and the question did not embrace the full treatment which was rendered to Mr. Morin, the objection embracing some of the facts that were omitted from the hypothetical question. The court overruled the objection and permitted the witness to answer. The answer by the witness (Tr-244) clearly invaded the province of the court, in that the witness admits that he had given considerable thought to the facts brought out, by his own investigation, and his answer clearly was a conclusion and a judgment of an ultimate fact in issue in this case. He states, in part:

“ . . . everybody knows . . . that I have very thoroughly studied all the charts; I have read and studied the reports of the physician; I have talked to the patient. I have deliberated this whole question in my mind for a matter of weeks. . . . I still have to say that the treatment was not correct; it was not what he should have obtained; . . . ”

“The answer to the hypothetical question as put is that in my opinion, under these circumstances, this patient did not get good care in his initial treatment.”

This testimony is not substantial. It is not predicated on the entire undisputed facts. *Lehman vs. Knott*, Supra.

Again (Tr-246), counsel's question to Dr. Cherry:

“Dr., under the circumstances under which man (sic) was suffering, what would you say would be

the result of the failure to treat this man within six to eight hours?"

calls for an answer based on a false premise because Dr. Schneider, appellee's witness, testified that Mr. Morin was treated. Are we justified in reading into this question, the implication that "failure to treat", means "failure to adequately treat"? The question, being based on a false premise, the answer could not be considered substantial evidence. To the same effect is Dr. Cherry's statement as follows:

"In observing this case, the records I have seen, I think the number of months of treatment and the number of operations and days of hospitalization and pain—I think, it was very greatly lengthened." (Tr-246)

This answer is again based on the incomplete hospital records and not on the record evidence of appellee. As we have repeatedly set forth, the records were incomplete and did not incorporate what was actually done by Dr. Schneider. Again, in connection with this answer, the court is left to speculate as to what Dr. Cherry actually meant when he twice used the words "I think".

Reference is further made to counsel's question to Dr. Cherry (Tr-249):

"Was the treatment rendered responsible for the present condition of Mr. Morin?

A: "Yes."

Here, again, the court must speculate as to what Dr. Cherry had in mind when reference was made to "the treatment rendered". As has been repeatedly covered aforesaid, Dr. Cherry has never acknowledged that there was anything done to this wound except as shown on the incomplete hospital report. (Tr-240) See Dr. Cherry's statement relative hereto as follows:

"From this report, this fracture was not treated. I mean the report does not say that it was treated. All the report says is that a compression dressing was put on." (Tr-240)

Again, Dr. Cherry stated: ". . . that the treatment was not correct; . . ." and, ". . . this patient did not get good care in his initial treatment. . ." (Tr-245)

What does this testimony mean? Does it mean that the treatment was negligent? In *Lehman v. Knott*, supra,—

"The distinction between improper treatment and negligent treatment is not as broad as it is vital. Improper treatment by a surgeon might be due to an error in judgment of a skilled surgeon, honestly and carefully exercised, and not constitute negligent treatment.— (citing cases)"

The Fifth Circuit in deciding the case of *Sanders vs. Leech*, 158 F. 2nd, 486, 487 lays down a reasonable rule:

"Under Rule 52a Federal Rules of Civil Procedure, it is not for the appellant court to substitute its judgment on disputed issues of fact for that of the trial court where there is substantial credible evidence to support the finding. It may reverse though, under the rule (1) where the findings are without substantial evidence to support them; (2) where the court misapprehended the effect of the evidence; and (3), if, though there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the cause."

See also *U. S. vs. U. S. Gypsum Co.*, supra; *Lassiter vs. Guy F. Atkinson Co.* (CA 9), 176 F. 2d ~~984~~ 984

It is submitted that there is no substantial evidence in this case to support the appellee herein, the testimony overwhelmingly supports the appellant and we believe the court misapprehended the effect of the evidence.

ARGUMENT IN SUPPORT OF POINT FOUR OF ITS ASSIGNMENT OF ERROR

The Court found that defendant herein was negligent and careless in failing to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon, and like communities in the treatment of comminuted compound fractures of the left tibia. It is contended that

there is no substantial evidence in this case to warrant this finding.

There is no evidence that the doctors charged with the early care of appellee abdicated or shirked their responsibilities. There is ample proof that they did exercise their professional judgment as to what treatment and care Mr. Morin should initially be given. Can it be said from a careful examination of the record that what those doctors did and the decisions they made were improper? If it was improper, was it not an error of judgment in retrospect and not negligence?

As to appellant's doctors not using that degree of care and skill in treatment of Mr. Morin which is ordinarily used by the average member of the medical profession in this community, there is a preponderance of the testimony herein of medical witnesses representative of a respectable segment of medical opinion of this community who testified that the treatment given to Mr. Morin, due to his serious condition, called for the exercise of medical discretion by appellant's doctors; that there was substantial evidence by these professional witnesses that the treatment given as determined upon in the judgment of appellant's doctors was such as to refute appellee's one contrary witness, and still physician of appellee, that the medical agents of the appellant were negligent in the exercise of discretion.

The *Malila v. Meacham* case, 187 Or. 330 at 354, 211 P. (2d) 747, cited as authority for the fact that a physician is

no insurer or warrantor of cures. In that case the Supreme Court of Oregon said:

"It is well settled that a physician or dentist is not a warrantor of cures, that the doctrine of *Res ipsa loquitur* does not apply in malpractice cases, and that, if a regular licensed physician or dentist with reasonable diligence employs the skill of which he is possessed in treating a surgical case, he is not liable for an error in judgment. *Moulton v. Huckleberry*, 150 Or. 538, 46 P. (2d) 589; *King v. Ditto*, 142 Or. 207, 19 P. (2d) 1100; *Rayburn v. Day*, supra, 126 Or. 150; *Emerson v. Lumbermen's Hospital Assn.*, supra, 100 Or. 481; *Lehman v. Knott*, supra, 100 Or. 71; *Hills v. Shaw*, 69 Or. 460 (1869). In *Moulton v. Huckleberry*, supra, the court explained the limitations of the rule as follows (150 Or. 546):

'It has sometimes been broadly held that a physician or surgeon is not liable for an honest error or mistake in judgment. Nevertheless a limitation of this broad rule is recognized in cases that exempt from liability for errors of judgment only where there is a reasonable doubt as to the nature of the physical condition involved or as to the proper course to be followed, or where good judgments may differ. Also another limitation of the broad rule stated is found in cases that hold that a qualified physician is not liable for an error of judgment if he applies ordinary and reasonable skill and care: 48 C.J. 1127, § 114.'

"In other words, to avoid liability the judgment of the physician or surgeon must be founded in his intelligence, skill, knowledge and care. *King v. Ditto*, supra, 142 Or. 217; *Rayburn v. Day*, supra, 142 Or. 151. . ."

Dr. Richard F. Berg, an orthopedic specialist in the city of Portland, Oregon, in commenting upon the care as given by the attending doctor in the initial phases of this case, stated:

“Well, a qualified man, I would say, should have a little better insight into it than someone who had not seen the circumstances. As I stated, every case presents a different situation, and it is hard for me to sit here and put the finger on someone whom I did not watch do the work. Based on general experience, as I say, I see nothing to be criticized in that treatment.” (Tr-360)

Again quoting from Dr. Richard F. Berg’s report set forth on Transcript page 393:

“It is my feeling that this man’s treatment has followed the pattern which is quite common in severe injuries such as his, and that unfortunately he developed some osteomyelitis which is likewise a fairly common incident in traumatic compound fractures.” (Tr-393)

It must be borne in mind that when Mr. Morin came to the Physicians & Surgeons Hospital and was admitted to the emergency surgery the history there given to Dr. Schneider was that he had fallen 20 feet and had lit on the base of his spine. With that history there can be little doubt that concern about Mr. Morin was warranted. As Dr. Schneider said, he was afraid to examine him more closely because he complained so bitterly of his back, and

again he said that he was afraid that the fracture of the back might sever his spinal cord and cause paralysis. In the face of that history, it seems that Dr. Cherry's bitter criticism of appellant's doctors at this late date comes in poor grace. It is submitted that the court was in error in determining that the care and skill as exercised by appellant's doctors was not of the degree as would be normally given by doctors in like communities.

ARGUMENT IN SUPPORT OF POINT SIX OF ITS ASSIGNMENT OF ERRORS

The discussions and arguments heretofore set out relative to appellant's statement of Points One thru Five are herein adopted in toto in support of appellant's Point Six. No additional argument is therefore deemed necessary.

ARGUMENT IN SUPPORT OF POINT SEVEN

The court's award of \$45,000.00 general damages in addition to the special damages awarded, which included alleged loss of wages and medical expenses to the time of trial, appears so excessive as to be "clearly erroneous", if the court should sustain the finding of negligence. The award of damages is appropriate for the appellate court to review "when the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake

has been committed.” (*U. S. v. U. S. Gypsum Co.*, 333 U. S. 364, 395; 68 SC 525, 542; 92 L. ed. 746; *U. S. v. Guyer*, 218 F. 2d 266 (CA 4, 1954)). In the case of *U. S. v. Guyer*, *supra*, the court stated:

“When convinced that a finding as to damages is clearly erroneous because in excess of any amount justified by the evidence, it is our duty to make a finding ourselves on the evidence in the record if this can be reasonably done.”

Plaintiff's evidence claims occupational experience as a hardrock miner and a present occupation as 3rd Mate on the dredge Wahkiakum, the latter being a civil service job in which the plaintiff claimed about \$450.00 per month take-home pay, with a prospective retirement from the civil service job after 12 more years. There is no showing that he will be incapacitated in his occupation, and, in fact, during the time between his injury and the trial, he had intermittently worked and at the time of trial was employed at full wage rate.

The plaintiff suffered grievous and serious injuries in his accidental fall, for which the government had no responsibility. The pain and suffering caused by that fall and the resulting physical impairment could be anticipated to be great and the recovery time-consuming with the most ideal treatment. It is unquestioned that at some state in the plaintiff's extensive treatment, osteomyelitis developed and additional surgical procedures were undergone which

resulted in inactivity, discomfort and disfigurement. The evidence of prognosis in the case from Dr. Cherry that osteomyelitis may recur is, at best, speculative. The testimony of Dr. Berg indicated that if a sequestrum were removed by surgery, he would consider the plaintiff's disability greatly lessened. (Tr-393) Remaining for primary consideration is the amount of reasonable compensation to be awarded. Assuming *arguendo* that negligent treatment was afforded the plaintiff by agents of the defendant and that such negligent treatment caused the osteomyelitis, it is to be determined how many of the operative procedures resulted from the osteomyelitis and what compensation the plaintiff should be entitled to for undergoing such operations and any disfigurement caused by any such procedures found to be attributable to the negligence of the defendant's agents, if any.

\$45,000.00 seems excessive as compensation for disfigurement of a portion of the plaintiff's anatomy which, in the normal course of his activities, is clothed. It likewise seems excessive coupled therewith for the discomfort attendant upon his hospitalization and convalescence for the period beyond which he could have normally expected pain, suffering and treatment under the most ideal of circumstances. It is asserted that the plaintiff was an active man, fond of sports and physical activities in the pursuit of which he is now restricted. The evidence is that the plaintiff, at the time of the judgment, was 45 years of age, and many

of the activities for which he claimed fondness, in collaboration with his children, could not be expected normally to long continue. His employability in the civil service job appeared, from the evidence, unhampered.

Comparable cases involving actions for medical negligence in Oregon indicate the judgment would be so excessive as to be clearly erroneous. See *Olson v. McAtee*, 181 Or. 503, 182 P. 2d 972. See also, cases in the neighboring state of California: *McCullough v. Langer*, 73 P. 2d 649, 23 Cal. App. 2d 510, which found \$25,000.00 as reduced from \$50,000.00 not excessive for burning of crushed thigh from infra-red rays, under evidence that the injury was permanent, involved great pain, impaired plaintiff's earning ability and made necessary repeated skin graftings. See, also, *Kershaw v. Tilbury*, 8 P. 2d 109, 214 Ca. 679, that \$30,000.00 award for unskillful treatment of osteomyelitis of leg of a 9-year old girl was excessive by \$10,00.00. And in the neighboring state of Washington, see *Olson v. Weitz*, 221 P. 2d 537, which was a malpractice action. Therein the court held that a verdict of \$15,000.00 for injuries consisting of necessity for open reduction and bone graft, pain, suffering and permanent injury resulting from malpractice by physician was excessive, but an award of \$9,000.00 was sustained after the trial court had ordered \$6,000.00 of verdict remitted as a condition to denial of a new trial. That such considerations are appropriate for consideration of the appellate court is held in *U. S. v. Guyer*,

supra. See also *Taylor vs. Kidd*, a Washington case reported in 72 Wash. 18, 129 Pac. 406, wherein the plaintiff sued for alleged malpractice of the defendant in setting a broken arm. Judgment was rendered in favor of plaintiff, which was on appeal affirmed conditionally. The court said:

"Finally, it is said that the verdict is excessive. With this contention we are inclined to agree. The size of the verdict would indicate that the jury felt inclined to visit the entire loss suffered by the appellant upon the doctor, whereas he was only responsible for the injury and suffering caused by his own acts, not those caused by the original injury with which he had nothing to do."

ARGUMENT IN SUPPORT OF POINT EIGHT OF ITS ASSIGNMENT OF ERRORS

The court found "that plaintiff will be required to undergo further operations. . ." Appellee's doctor stated (Tr-249):

". . . he has osteomyelitis which may recur—it has a tendency to recur. . ."

Dr. Berg said in his written statement (Tr-393):

"At the present time, I think the persistence of the drainage is probably due to the small sequestrum which is visible in the lower portion of his wound and which will probably be extruded spontaneously if it is not curetted out before that time. . ."

It is not believed there is any testimony supporting this finding and therefore it was error for the court to so hold.

CONCLUSION

For the foregoing reasons, the judgment appealed from should be reversed and the complaint herein dismissed.

Respectfully submitted,

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In the United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
vs. Appellant,
AMOS R. MORIN, Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court
for the District of Oregon

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In the United States
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UNITED STATES OF AMERICA,
vs. Appellant,
AMOS R. MORIN, Appellee.

APPELLEE'S BRIEF

On Appeal from the United States District Court
for the District of Oregon

STATEMENT OF FACTS

Appellee regrets he cannot adopt the Statement of Facts in Appellant's brief; but because of omissions and inaccuracies it is felt necessary to briefly outline the story with transcript reference. No attempt will be made at this time to put specific facts in dispute as this is more properly done in argument; particularly so in this case where the main point for appellate review is a question of fact which will call for specific reference to the evidence and testimony. Because of this, the Court is respectfully asked not to take

our failure to specifically refute any particular part of appellant's Statement of Facts as an acquiescence in the truth of that particular fact; but to bear in mind that we have attempted to accurately state the pertinent facts excluding the unnecessary and immaterial.

Appellee, plaintiff below, was a seaman employed on a dredge by the U. S. Army Engineers and as such was entitled to hospitalization and treatment under the care of the Public Health Service even though his injury or disease might arise while he was off duty. Appellee carried Blue Cross Insurance that entitled him to certain hospitalization benefits; and as a veteran would be entitled to admission to a Veteran's Administration Agency if facilities for his treatment were available.

Between noon and 12:30 P.M. on June 10, 1952 Appellee fell from a ladder at his home in Portland, and in falling caught his left leg between the rungs. (Tr. 45) He was found by his children lying on the ground with his leg still entangled in the ladder. (Tr. 33-34) There was blood all over his stocking and the bone was protruding out about two to two-and-one-half inches. The white of the bone was clearling visible, and it appeared to have ripped right out through the leg. (Tr. 34) The skin was badly torn. (Tr. 43) A neighborhood doctor came immediately and administered a sedative and noted his treatment on a tape which was placed on the patient's forehead.

The patient was taken immediately to the Physicians and Surgeons Hospital in Portland, Oregon. This was at his request and instruction. He arrived there shortly after 1:00 P.M. (Tr. 136 and 218) and was complaining about pain. The testimony of appellee was that he was in great pain in back and leg, but that the pain was mostly in his leg. (Tr. 163) On arrival he was told that they would have to cut his trousers to which he acquiesced. This was in the emergency room in the presence of a doctor. (Tr. 164)

Dr. Constantine Otto Schneider who was taking his residency at Physicians & Surgeons Hospital, was the only medical man who saw the patient on arrival. It was his duty to render initial emergency care and to immediately notify the staff doctor who was to have charge of the patient; and, if instructed by the staff doctor, to go forward with further treatment. In lieu of such instructions his responsibility ended. (Tr. 123) His initial emergency care consisted of examining the wound and he then washed it with a sterile saline solution. (Tr. 83) and cleansed it until it was fairly clean and then applied a compression dressing and possibly a light yucca board splint, (Tr. 79, 80) and then sent the patient to x-ray. (Tr. 80) The cleansing of the wound was an external one. (Tr. 83 and Ex. 16, p. 24) Dr. Schneider described initial treatment as a superficial cleansing. (Tr. 74) In addition to the foregoing treatment, Dr. Schneider prepared for the possibility of shock by typing his blood and making certain that a supply was ready

for a transfusion in the event the patient went into shock. This is routine procedure in the case of serious fractures.

Dr. Schneider's examination and the x-rays showed that the patient had suffered a simple fracture of the left tibia plus a compound, comminuted fracture of the left tibia, a compound fracture of the left fibula, and also a compression fracture of one of the lumbar vertebrae. (Tr. 97) The skin of the leg had two openings in it, one an inch-and-a-half long and the other about an inch long and also an abraded area. (Tr. 95)

Dr. Schneider then notified Dr. Lee A. Craig of the Public Health Service and was told to consult with Dr. John B. Leonard, one of their consulting doctors. He did so and was given no further instructions. Dr. Schneider's responsibility as a resident thus ended; although he personally felt that the patient's condition at this time indicated immediate emergency care which might necessitate going to surgery. However, since the staff doctors had come into the case by telephone consultation, Dr. Schneider had neither responsibility nor authority to see to it that such further emergency care was given. (Tr. 113)

Dr. Craig did not see the patient at all on June 10. (Tr. 138) He first saw him on the morning of the 11th of June, at least twenty hours after the accident. He did not look at the wound. (Tr. 140-141) Dr. Leonard, the other responsible staff member, first saw the patient about the same

time as Dr. Craig, on June 11th, in making his rounds; but he has no independent recollection of the case and the record discloses that the bandage applied by Dr. Schneider was not disturbed and he, too, did not look at the wound. (Tr. 297, Tr. 114, Pl. Ex. 1) The only Portland doctor who looked at the wound was Dr. Schneider.

Drs. Craig, Leonard and Morrison, the latter the chief Public Health doctor at Portland, between them decided that it was safe to send the patient to Seattle and have the necessary surgery performed there. The first consultation had between Drs. Craig and Leonard was about 11:30 A.M. on June 11. (Tr. 144, 145) It was finally decided for reasons of economy to send the patient to the Marine Hospital in Seattle. (Tr. 51; Tr. 344) He was sent to Seattle by ambulance at 8:00 A.M. June 12 and arrived about noon the same day, approximately 48 hours after he was injured. (Tr. 149)

The patient was comatose on arrival at Seattle. The wounds in the leg were infected. (Ex. 3, p. 9) The hospital records show in addition that the wounds after the ambulance trips were respectively 12 centimeters (approx. 5 inches) and 5 centimeters (approx. 2 inches) in length. It is only fair to say that Dr. King testified that the wounds were not this large. The x-ray comparison showed an increase in displacement of the bones. (Tr. 279) The patient had bruises on his head and arms. (Tr. 56) He was imme-

diately taken to surgery and the wounds cleaned, debrided, the fractures reduced and the wounds closed, and the patient placed in a body cast. Later, on July 11, 1952, the surgeons at the Marine hospital, in surgery under aseptic conditions, inserted an Eggers Plate in the left tibia. After approximately one month's further treatment the patient felt his progress was still unsatisfactory and he decided to leave the Seattle hospital and to return to Portland to obtain orthopedic care. He left Seattle August 13, 1952. (Tr. 175) In the Seattle Hospital he was operated on by a General Surgeon and not by an Orthopedic Surgeon.

The history of the patient's treatment in Seattle shows the results of the poor care in Portland. The nurse (Tr. 55) and a Dr. Brown, a Public Health doctor, (Tr. 166) both expressed amazement at the type of treatment the patient received in Portland. Dr. Tucker, Assistant Surgeon at the Marine Hospital in Seattle, the first person to see appellee on arrival at that institution, on examination found the wounds in the leg to be infected (Ex. 3, p. 9) Dr. Tucker stated that the patient arrived in poor condition with exposed bone showing in compound tibial fracture, was bleeding and smelled very badly. (Ex. 3, p. 18) During treatment Dr. Charles Keever, an intern at the Marine Hospital, noted that there was infection of the bone (Tr. 329, Ex. 3, Progress Notes 7-24-52); but it is only fair to state that Dr. Walker took issue with this finding relying on the hearsay statement of a pathologist who did not testify.

On return to Portland the family doctor, Dr. Thorup, came to the home of appellee, examined the wound through the window in the cast, and he immediately administered penicillin. This was August 14, 1952. (Tr. 176) Dr. Thorup called in Dr. Cherry, a leading Portland Orthopedist, who commenced treatment immediately. Unfortunately, Dr. Thorup was not available for testimony as he was in Europe during the trial of this case. Dr. Cherry first saw the appellee on August 24th; and during the ten day interim penicillin was administered to him every day by Dr. Thorup's nurse.

On August 25th Drs. Cherry and Thorup did a closed manipulation of the leg under anesthesia (Tr. 177) The bone had not yet set and was angulated. (Tr. 205) At this time Dr. Cherry testified there was infection present in the bone. (Tr. 206) The wounds were draining and the skin was unhealthy. The condition was described as locally critical. (Tr. 210) This description was defined as meaning that there was question whether the situation would or would not heal because of the infection. (Tr. 210, 211) There was pus present. (Tr. 260) The infection was described as a latent infection that could flare up at any time. (Tr. 260) The patient was in a private hospital until August 28th, and under observation and treatment by Dr. Cherry for several months during which time the wound site condition continued to deteriorate until January 24, 1953 when he was rehospitalized by Dr. Cherry. (Tr. 207) This hospitalization was for the removal of the Eggers plate, in

surgery under aseptic conditions, the plate having served its purpose in stabilizing the bone shaft to permit union of the fragments, but was now an irritating foreign substance that was aggravating the infected condition of the bone and the drainage out through the open wound site. During this period appellee was able to go back to work as his superior gave him light work .(Tr. 178)

Subsequent to the second hospitalization under Dr. Cherry's supervision the appellee made application to enter the Veteran's Hospital in Portland where he was treated by Dr. Davis, one of the doctors associated in Dr. Cherry's office. During his period in the Veteran's Hospital the patient was visited by Dr. Cherry although he was not a member of the staff of that institution. In the course of the confinement in the Veteran's Hospital, many operations were performed on the leg, including the grafting of skin from one leg to the other, which required a long period of immobilization of the patient in a cross-legged cast. One of these periods lasted as long as six weeks. (Tr. 182) In all the patient had fifteen different skin grafts. (Tr. 183 and Ex. 10, Reg. No. 89738 and Reg. No. 87273, U. S. Vets. Hosp.) He has had flesh removed for grafting on the left leg, from his right leg, left thigh, and other parts of his body and still has a residual tenderness in some of the places from which skin was grafted. (Tr. 182) The leg was still draining at the time of the trial (Tr. 184), and it will probably continue to drain and give trouble. (Tr. 249) He has

and will have a deformed leg and osteomyelitis which tends to recur, pain and tenderness in the ankle which will improve.

The Court entered judgment for \$45,000 general damages and \$4,711 special damages.

ANSWER TO POINTS 1 AND 3

The District Court did not err in finding that the appellant failed to render immediate, adequate and proper medical and surgical treatment.

ARGUMENT

I.

The first portion of the argument in appellant's brief is in support of points 1 and 3 of their assignment of errors which points are as follows:

"1. The evidence in the case fails to establish that there was any deficiency in the treatment accorded appellee in the Physicians and Surgeons Hospital at Portland, Oregon".
"3. The Court erred in finding that appellant in treating appellee did so in a negligent, careless manner proximately causing injuries to appellee, by failing to render appellee immediate adequate and proper medical and surgical treatment, cleanse, debridement and closure of the wounds at the site of the fracture of the left tibia."

By these assignments of error, appellant has claimed that the finding of fact by the Court below was not supported by any evidence. As is well established, the finding of fact is binding on the appellate Court unless the Court can affirmatively say that there is no substantial evidence to support the finding; and, therefore, in arguing this point it is only necessary for appellee to show proper evidence in support of the finding and not incumbent upon us to show that the finding was correct, although we think the same was clearly the only finding that could be made on the evidence.

In order to organize the answering argument to the points raised by appellee in this portion of his brief, we will review the evidence regarding the different problems which we think are involved in the case and questioned in appellant's brief. We will attempt in this review to get a whole picture and refer the Court to the pertinent testimony in the transcript rather than quote out of context certain isolated answers as was done by appellant. We will, however, quote portions sustaining the verdict found below when we deem it necessary so to do.

A. Condition of Left Leg After Fall and Upon Arrival at Physicians and Surgeons Hospital.

The evidence clearly shows that the left leg was suffering from severe fractures. There were two compound fractures, one of the tibia and one of the fibula, each of which tore through the skin and caused profuse bleeding, and

created the entry points for the present infectious condition of the appellee's tibia. Four persons testified as to the condition of the leg immediately after the fall. David Morin, plaintiff's son, described it as follows:

"A. It was his left leg. There was blood all over his stocking and the bone was protruding out about two inches or about two and a half inches. You could see the white of the bone very clearly. It looked like it had been ripped right out through his leg. There was blood all over his stocking and his pants were bloody, so you could see it." (Tr. 33, 34)

Dale Morin, another son, testified as follows:

"A. Yes, I looked at it. You could see the bone was broken and it was sticking out of the leg about two and a half inches.

Q. Can you show us on your leg which side of the leg the bone was sticking out?

A. The bone was sticking out on this side of the leg.

Q. You are pointing to the outside?

A. Yes.

Q. Can you tell us what it looked like?

A. A big gash and quite a bit of blood and bone was sticking out about two and a half inches.

Q. Do you have any idea of the size of the gash or cut?

A. It was about two and a half or three inches long." (Tr. 40)

Mrs. Shirley Cannard, plaintiff's daughter, testified as follows:

"... his leg was bent in over a rung of the ladder and at the time he was lying more or less on his right side, and the bone was sticking out and there was blood all over and the skin was all torn where it came through because the bone was pointed . . ." (Tr. 45)

and Amos R. Morin, the appellee herein, testified, (Tr. 161) that he could see the bone was sticking out himself as he lay on the ground after the fall.

The x-ray films of Morin's left tibia and fibula taken on June 10th, 1952 soon after Morin's arrival at Physicians and Surgeons Hospital, were interpreted by Dr. Cherry (Tr. 213, 214) as showing a complete irregular fracture that is completely offset.

The line of soft tissue, muscle, fat and skin was visible in the x-ray and from the x-ray reading it appeared that the bone fragment was completely outside of the skin. The diagnosis from the reading was fracture of the fibula and tibia, compound with *severe* displacement. (Tr. 214, Ex. 2 A and 2 B.)

Dr. Schneider was the only physician in attendance at Physicians and Surgeons Hospital who took the trouble to see the wound to the left lower leg. Drs. Craig, Leonard and Morrison (Tr. 343) did not look at the wound site. (Ex. 15, p. 16 and Tr. 309) Dr. Craig has no independent

recollection of whether he was informed that the fracture was compound. (Tr. 133)

No recorded description of the wound exists in the Portland hospital records and the responsible attending physicians in that city, in addition to not seeing the wound, are not certain that they were informed of its extent or nature. (Tr. 135, Dr. Craig) Dr. Leonard does not remember what happened and testified only from what he was told. (Tr. 309)

While the Portland record does not describe the wound, the Seattle U. S. Public Health Service hospital Record (Ex. 3) in the narrative summary describes the laceration to the left shin as "approximately 12 cm. long and 4 cm. wide . . . with proximal bone fragment out through the wound". The clinical record signed by A. Tucker, Assistant Surgeon, dated June 14th, 1952, gives the same description (Ex. 3, p. 9) and in the operation report from the Seattle hospital, the wound is described as a coarse laceration in two parts, one about one and one-half inches long and the other an inch long with the bone visible through the skin.

Dr. Cherry, in comparing the condition in Portland with that on arrival at Seattle, states there was more displacement of bone and damage to soft tissue. (Tr. 279, 280)

Thus, there is no question but there was a severe and dangerous laceration of the skin of the left tibia caused by and aggravated by a double compound fracture. The skin

was not merely punctured, it was torn, bleeding and the bones were exposed. The initial damage was great. The subsequent tearing and aggravation caused by the trip of some 200 miles by ambulance from Portland to Seattle and the delay thereof added to the immediate seriousness and subsequent injuries to these wounds and the infection of the bones adjacent to them.

B. Treatment in Portland June 10th, 11th and 12th, 1952 at Physicians and Surgeons Hospital Was Not Proper and Constituted Malpractice.

Appellee was not properly treated in appellant's hospital facility in Portland. His condition required immediate care by a competent surgeon. The need for immediate and adequate care is printed out in Plaintiff's Exhibit 14, page 58, *Pictorial Handbook of Fracture Treatment*:

"A compound fracture constitutes one of the most serious of all emergencies. The involved bone is exposed through the skin and must be considered to be potentially infected. The need for prompt and adequate surgical care is as urgent as that for the treatment of acute appendicitis, a ruptured spleen or perforation of a peptic ulcer. Delay in treatment of a compound fracture may result in infection, with osteomyelitis, septicemia, non-union, prolonged invalidism, loss of a limb or death."

Instead appellee received a form of First Aid which is best described by Dr. Schneider, the trainee resident at Physicians and Surgeons Hospital, as:

“... my treatment was confined to an emergency. It would be necessary in emergency to give the same sort of treatment *that anyone who sees a man with a fractured leg would be entitled to give.*” (Tr. 85) (Italics added)

Dr. Schneider acknowledged his lack of competency to give the imperative treatment required. His authority and right to continue treating also ceased when the staff doctor, Dr. Craig, failed to further instruct him. Unfortunately, Dr. Craig and his consultant, Dr. Leonard, only relieved Dr. Schneider of responsibility. They failed to take it on themselves and in effect did nothing. Thus Morin was without effective care from early afternoon of June 10 to the morning of June 11—and thereafter until June 12 in Seattle. The first eight hours after injury on June 10 was the “golden” period of treatment as plaintiff’s expert, Dr. Cherry, described it; but Drs. Craig and Leonard did not bother to come near the hospital or even let Dr. Schneider, admittedly not qualified, give any further help. And when, twenty hours late, they deigned to see the patient, the so-called qualified men did not even look at the wound.

We respectfully submit the treatment was not only inadequate, it was virtually non-existent.

In addition to the foregoing quotation of basic medical principles, we have the following evidence as to proper treatment. Dr. Cherry testified:

"The proper treatment, in my opinion—and I believe it is shared now universally—is that this wound should be very carefully examined, carefully cleaned, to its depth, reduced if possible and the wound closed. If there is any foreign material anywhere, it should be removed, if there is devitalized tissue anywhere it should be removed." (Tr. 240, 241.)

The summary of the operation at the United States Marine Hospital in Seattle, June 12, 1952 at 3:03 P.M. (Tr. 95) describing the procedure followed within three hours of Morin's arrival in Seattle was the same procedure as that described by Dr. Cherry in his statement of what constituted proper practice in this case. Dr. Cherry defined the negligence of the appellant in his testimony (Tr. 245, 246) as being the failure to give the treatment he indicated as the proper and universally accepted treatment within the period of five or six hours after the injury. (Tr. 245, 246) The only thing wrong with the treatment eventually received was that it was several days too late.

In addition, Dr. Cherry testified:

"I would say if there had been only one gross error in his treatment, I would say the lack of adequate immediate care, nothing else, is of enough significance to be of extreme importance to me. I think there may have been a little more judgment used in some of the other things, but it does not compare in what is going to happen to this man over the months and years ahead, does not compare to this one error of not getting adequate care early." (Tr. 245)

All that Dr. Schneider stated was done by him, the only physician in Portland who treated the wound, was:

"Q. You have testified you externally cleansed the wound with this sterile saline solution, and that you then bandaged the wound and, to your recollection you applied a splint. Is that a fair statement of what you did?

"A. That is correct, except I am not positive that I applied the splint at that time or after the X-rays were taken, but I am sure I applied a splint to that man. That is customary." (Tr. 92, 43)

Dr. Schneider's idea of the adequacy of the treatment is set forth as follows:

"Well, you mean my right to carry on treatment? Well, certainly, my treatment was confined to an emergency. It would be necessary in an emergency to give the same sort of treatment that anyone who sees a man with a fractured leg would be entitled to give." (Tr. 85)

He was obviously embarrassed despite his lack of professional responsibility.

Even Dr. Leonard's idea of proper treatment contradicts appellant's contention as he required internal irrigation of the wound-site. (Tr. 308) A surface or external cleansing of the wound was not adequate and in order to adequately clean this wound the patient would have to be in surgery and under an anesthetic. (Tr. 268)

Knowing that there was a gross failure to render the needed care, an attempt was made to excuse the same because of shock and ileus. There is no evidence that Drs. Crag or Leonard were told of shock or ileus for a very salient reason: these were not problems. They are afterthoughts and lame excuses.

Appellant contends that the initial treatment in Portland was proper and tries to justify the failure to give the surgical treatment within the time indicated by Dr. Cherry by emphasizing the possibility of shock. The record does not disclose any justification for this. Dr. Schneider characterized plaintiff's condition as "incipient shock". (Tr. 79) While cross-matching of blood for transfusion was made no blood was ever given. (Tr. 89) This was done simply in anticipation of the possibility of shock. Dr. Schneider mentioned "incipient shock" in answer to a question whether the patient ever was in actual shock, (Tr. 91) and stated that he never was in *actual or complete shock*. (Tr. 121).

Dr. Craig, when asked: "From your observation of the patient, not from what you were told, would you say the patient was in shock", replied, "No." (Tr. 143).

Dr. Cherry stated that all fracture cases are in incipient shock but this is not serious. It may need no correction and is always met by a blood transfusion. This is not an extraordinary condition. In this case he states there was no treatment for shock. (Tr. 223)

Nobody was interested enough during this period to order the taking of frequent blood pressures which would usually be taken if any real fear of shock existed. (Tr. 226, 227, Tr. 142, 143) Where there is fear of shock the blood pressure is taken every half hour. (Tr. 227) The only indication revealed by the Portland record (Ex. 1) relating to a condition of shock was the cross-matching of blood explained above and this is routine in fracture cases.

Very evidently the element of shock as a deterrent to prompt and adequate surgical treatment within the golden time in the treatment of compound fractures of from six to eight hours after injury, (Tr. 241) did not exist as a sufficient factor at the time of the Portland hospitalization to prevent the giving of the needed treatment for Morin's condition.

The same can be said for ileus, which is described as loss or relaxation of the bowels, bladder and organs of that type. (Tr. 92) Its onset was said to be shown by the need for catheterization at about 10:30 P.M. on the 10th of June. Its presence would not be anticipated in a fractured back usually until about 24 hours. (Tr. 231) The fact that on the morning of June 11th at 6:00 o'clock Morin was able to have "a light diet and ate fair" indicates he did not have an ileus or shock and that he was cooperative at that time and able to eat. (Tr. 232)

All Morin received was first aid. This was not Dr. Schneider's responsibility or fault. It rested with Drs. Craig and Leonard, the Public Health Service doctors who were not interested enough to see the patient when it was important or even give instructions. This was inexcusable and gross inattention. (Memorandum Opinion, Tr. 22)

The surgical treatment given in Seattle on June 12, 1952, which is the treatment that Morin insists should have been rendered to him within the first six to eight hours of his stay at the Physicians and Surgeons Hospital in Portland, Oregon, is described in Exhibit 3 in the operation report and in the transcript. (Tr. 95).

After reviewing the entire hospital record at Physicians and Surgeons Hospital, in the course of his testimony and upon being questioned as to whether Morin was properly treated during his course of hospitalization in Portland, Dr. Cherry testified as follows:

"A. Any compound fracture is an immediate emergency, and anybody who ever went through medical school should know it. We spend hours and hours trying to teach everybody that point. This is a compound fracture and it is a severe thing and it involves an area where there is notoriously poor healing, and if any compound fracture is an emergency this would be a great emergency.

The proper treatment, in my opinion—and I believe it is shared now universally—is that this wound

should be very carefully examined, carefully cleaned, to its depth, reduced if possible and the wound closed. If there is any foreign material anywhere, it should be removed. If there is devitalized tissue anywhere, it should be removed.

The time element is of extreme importance. We figure that what we call the golden time in the treatment of fractures, compound fractures, is from six to eight hours.

If we get a fracture at 3:00 o'clock in the morning, we get out of bed and we come and call the surgeon and anesthetist and x-ray technicians, everybody—it takes about ten people—and that fracture is treated just as soon as we can do it, in order that we can treat this patient properly, because when contamination gets in there, you get danger of infection and of impaired healing, and we figure that the time is from six to eight hours, the earlier the better, but after that length of time the tissue is damaged and cannot heal as well as it could before that.

When it goes 24 hours, ordinarily we would not even close it because there would be danger in closing the wound.

The most striking thing about this whole thing to me is how people practice medicine and don't know that or don't practice it; that is, early, adequate cleaning, reducing and closing and fixation of the compound fracture. You would not expect everybody certainly to be able to do it adequately, but I would expect anybody, a nurse or anybody, if they didn't know how to do it, I would expect them to know what should

be done, and, if they can do it themselves, why, then, go ahead; if not, get some help.

The criticism I have, after carefully studying this, is that, not that they wouldn't know how to do it but that they did not, for some reason, either do it right then or call someone in who knew how to do it."

. . . .

"A. I would say if there had been only one gross error in his treatment, I would say the lack of adequate immediate care, nothing else, is of enough significance to be of extreme importance to me. I think there may have been a little more judgment used in some of the other things, but it does not compare in what is going to happen to this man over the months and years ahead, does not compare to this one error of not getting adequate care early." (Tr. 240-245)

This testimony plainly informed the Court of the deficiency in the treatment afforded Morin in Portland and stated the proper treatment to be given.

Appellant's own expert, Dr. Walker, confirmed the opinion of Dr. Cherry, when questioned by appellant's counsel on the need for immediate treatment:

"Q. But is that something that the general medical profession would, in your opinion, concede, that in these situations each case must be dealt with individually and left to the judgment of those who have seen him and know what his condition is at that time?

A. Yes, if they have competent backgrounds and have competent reasons for their judgment, yes.

Q. I think you have told me that where a man's general condition permits you would like to take him to surgery within six to eight or ten hours?

A. Yes.

Q. The sooner the better?

A. Although that deadline of six hours is pretty arbitrary, a pretty arbitrary deadline. Antibiotics have done wonderful things for surgery in general and fractures in general, as well. I cannot say arbitrarily six hours or five hours, or say that within five or six hours you are not going to get an infection and in six hours and one minute you are. Antibiotics have changed all that. You can see it evident in this particular case." (Tr. 335)

And again, Dr. Richard F. Berg, called as an expert witness by the appellant, upon questioning, clearly indicated that he deemed immediate and prompt treatment to be the proper course of treatment for wounds and injuries of this type.

"Q. You would consider a compound fracture of the lower third of the tibia more or less a serious situation?

A. Yes, I do. I think that compound fractures any place are an emergency.

Q. Isn't that particular portion of the tibia particularly dangerous, when there is a fracture of that type?

A. There are, in any portion of the tibia, either the upper part or the lower third.

Q. Isn't it ordinarily the practice to go in and clean and debride the wound as quickly as possible?

A. According to our teaching and from the books, that is the thing to do, but, as I said, there are instances where your judgment, after evaluating the situation, looking over the situation, sometimes you defer very active or intensive work.

By 'debridement' maybe I mean something else than you do. Debridement is quite an extensive and detailed piece of work. We have to be careful of the nerves and of the blood vessels. Sometimes—

Q. You generally do that right away, don't you?

A. Yes, try to do it right away.

Q. *Ordinarily, if you are called in on a compound fracture of that type, do you wait until the next morning before you visit the patient, if you are called, say, in the afternoon?*

A. *Not ordinarily. I like to do it just as soon as I can.*

Q. You would not wait until 11:00 o'clock the next morning to go over to see the patient, ordinarily?

A. Not unless I was pretty assured he was all right and that he had been taken care of.

Q. What about exposure of the wound?

A. Well, there again we run into two schools of thought. In the early days we would have been very much criticized for closing any open wound. Nowadays we close them because we have antibiotics, although you do not have to necessarily suture them, if

you put some form of dressing on and cleanse them. They are continuously filling in, you know." (Tr. 362-363)

Dr. Berg, appellant's own witness, when questioned by appellant's counsel regarding the treatment given by appellant's physicians in Portland qualified his answer that he found no fault therein by saying,

"Under the circumstances, I would say, inasmuch as there was no possibility of openly reducing the fracture or continuing the treatment of this man in the present locality, under those circumstances I would see no fault in that at all, in the manner in which it was handled."

It is submitted that there is no evidence in this case showing why Morin could not be treated in this locality and that Physicians and Surgeons Hospital is and was a grade A hospital (Tr. 138) and was equipped and capable of caring for a patient in Morin's condition.

The Court is referred to a complete reading of the excerpts from plaintiff's exhibit No. 13 appearing in the transcript of record (Tr. 375 through 386) which confirms Dr. Cherry's testimony when read totally and not when treated to the piecemeal attention given by appellant. You are referred to the testimony in the transcript where appellant pursued the same use of language out of context as is used in the brief. (Tr. 268, 269, 270)

Dr. Schneider consistently indicated that he did not feel competent or qualified to deal with the treatment of Morin. (Tr. 98, 99, 115)

"Q. My question is: Would you have preferred to have had a more experienced surgeon with you?

.

A. I believe that would be logical for anyone, sir."
(Tr. 98)

And further:

"Q. Would you have considered it good practice to have taken such a man direct to surgery and given him a general anesthetic, a man that was in that serious condition?

A. I think that someone more specialized in surgery than myself would be more qualified to answer that question." (Tr. 115)

Dr. Berg when questioned with regard to the element of discretion said,

"A qualified man, I would say, should have a little better insight into it than someone who had not seen the circumstances."

And Dr. Paul Walker, an expert appearing for appellant, when questioned by appellant's counsel in testimony appearing above in this brief (Tr. 335) conditioned the right of a physician to exercise discretion in the circumstances confronting Dr. Schneider by saying that discretion

could only be exercised by those having competent background and having competent reasons for their judgment. (Tr. 335) It is submitted that Dr. Schneider by his own testimony disqualified himself for making the decision.

Thus the only person exercising discretion in treatment was one who by his own admission was not qualified to do so; and, moreover, handicapped because the responsible doctors did not give him further instructions or even see fit to look at the patient the day of the injury or to look at the wound at all at anytime.

ANSWER TO POINTS 2 AND 5

The District Court did not err in rendering a verdict in favor of appellee because there was substituted evidence to support the verdict and to establish that appellant's malpractice was the proximate cause of appellee's damages.

ARGUMENT

We will not here repeat all the incidents that indicated the existence of an infection because of the poor treatment in Portland which have been heretofore pointed out in our Statement of Facts and in our discussion of the previous points. Suffice it to say that everything in the trial of this case points to the fact that upon arrival at Seattle the patient had a latent infection in the wound site. An attempt was

made by counsel for the appellant to insert into the case the possibility that the infection could have started entirely from poor tonsils or sinus infection. The statement by Dr. Leonard, appellant's witness, on page 300 of the transcript indicates that this is a possibility but it doesn't happen too often. Dr. Cherry, a qualified orthopedic surgeon in Multnomah County, Oregon, who is constantly dealing with this particular problem, answered the question regarding this possibility as follows:

"That is quite an involved question. I can say that there may be theoretically a remote possibility of it occurring at the fracture site. I would also say that I have never known it to occur; I have never seen it and, in my recollection, I have never seen it in the literature, and I would say that possibility is extremely remote, while on the other hand you have a very obvious reason why it would occur in a compound fracture." (Tr. 250)

The obvious reason referred to is the failure to treat the patient in the golden six or eight hour period immediately after the accident.

It is important that the emphasis on the question of osteomyelitis and infection does not blind the Court to the fact that there were other consequences of the negligence of appellant that caused damage to Morin. Some of these other consequences were poor union of the bone, poor healing and impairment of circulation in the leg, damage to the skin and general prolongation of treatment, numerous

additional surgical operations and the pain and suffering that accompanied this prolongation and further operations together with the residual pain and suffering which the patient is now enduring.

We state quite emphatically that rather than this question of proximate cause being a matter of doubt and that we have failed to support the same by any evidence, that we feel that there was no other conclusion that could be drawn from the evidence and facts introduced at the trial but that all the probabilities point to the fact that the failure to give the proper treatment in Portland and the sending of the patient by ambulance, under the conditions recited in the transcript, to Seattle was the cause of the infection, the failure to heal of this wound and the failure of the bones to unite and the numerous surgical procedures that were necessary because of this negligence.

Dr. Cherry's testimony is unequivocal as to the cause of the infection and the other consequences just above enumerated. Dr. Cherry is backed up in his opinion by the texts which warn that treatment must be prompt in order to avoid the varying consequences that here followed because of the negligence of the appellant. Appellant by bringing up a remote possibility attempts to shake the opinion expressed by Dr. Cherry and backed up by medical thought and practice. However, Dr. Cherry in answer to these questions, while admitting it is always possible for almost anything

to happen, states that in his opinion cause of this condition was the poor treatment in Portland.

Coupled with Dr. Cherry's opinion, you have the eloquent evidence of the admission record at the Marine Hospital showing that the wound was infected, the several comments of the personnel of that hospital regarding the poor Portland treatment and the fact that Dr. Thorup gave penicillin immediately upon seeing the patient on his return to Portland and Dr. Cherry found the limb to be infected on his first examination. All of these things show that the wound was infected in Portland and that the trouble that was had in Seattle and subsequently, was a direct result of the inattention and inexcusable neglect of the Public Health Service in Portland.

As quoted in the case of *Ronner v. Bekin's Moving Company*, 125 Or. 280 at 287, 266 P. 627, there is in this case the same situation:

"There is a logical chain of circumstances leading up from the injury to the death, and an apparently competent expert is practically positive that the death was the result of injuries, which other testimony tends to indicate, were inflicted by the negligence of the defendant's employee."

The chain in the instant case is complete and points directly to the damage that resulted.

This is not a case of a speculative verdict. An able and experienced trial judge who has examined the records and listened to the testimony, drew the only conclusion that could be drawn from the evidence: that gross neglect in Portland caused an infection and the failure of healing of the wound and leg of Morin and the trial Court's decision is well supported by much evidence. Indeed a finding to the contrary would be reversible error if we were appealing from such a finding.

Appellant quotes language from the case of *Lehman v. Knott*, 100 Or. 59, 71, 196 P. 476 regarding the distinction between improper treatment and negligent treatment. (Tr. 49) This particular language of the Oregon court in *Lehman v. Knott*, supra, was considered and explained in the case of *Malila v. Meacham*, 187 Or. 330, 334, 335, 211 P. 2d 747, where the question raised by appellant in his brief at page 49 is fully answered. Appellee depended upon the language of the *Malila* case, a case in which one of Morin's counsel represented the plaintiff, in guiding the choice of questions asked of Dr. Cherry. The language appearing in appellant's brief at page 49 was cited to the Court in the *Malila* case to substantiate the defendant's contention there that it was error to ask this question: "Assuming that those facts did exist, would you say it was proper practice to extract a tooth under those conditions?" Saying that it was difficult to perceive the relevancy of the language quoted on

page 49 of appellant's brief to the issues before the Court in *Lehman v. Knott*, the Oregon court said:

"In a malpractice case the question whether a physician has in a given case adopted the proper treatment is one in which the opinions of medical men may be received in evidence and they may state whether in their opinion the treatment was proper or not, whether it was in conformity with the rules and practice of the profession."

The court then says:

"... Counsel for the plaintiff should have the right to rely on these pronouncements of this court, and they should be adhered to unless the rule they announce is demonstrated to be unsound or likely to bring about miscarriage of justice. Neither of these things, in our opinion is true." *Malila v. Meachem* (supra at 334, 355).

The statement extracted from *Lehman v. Knott* by appellant was discredited by the Oregon court and the *Malila* case fully answers appellant's inquiry. It is stated clearly in the *Malila* case, "The question, therefore, is whether an opinion of a qualified medical expert that a given treatment was not proper does, in substance, constitute evidence of such fault. We think that it should be so held." (*idem.*, p. 336)

In view of the fact that Dr. Cherry was a treating physician of Morin, and by personal knowledge and observa-

tion was familiar with facts upon which his conclusion was based a hypothetical question was not necessary to permit the admission of his opinion with regard to the propriety of the treatment given and the result of the failure to give proper treatment. (Tr. 244, 267) *Foot v. Lindstrom & Feigenson*, 143 Or. 309, 312 (22 P. 2d 321); *Carnine v. Tibbetts*, 158 Or. 21, 38 (74 P. 2d 974). The *Foot* case is quoted in the *Carnine* case at p. 31: 38

“Where an expert witness, by personal knowledge and observation, is familiar with the facts on which his conclusion is based, and those are the facts which have been testified to in the cause, there is no necessity of supplying the hypothesis.”

However, in the abundance of caution and to fully present the evidence in this case, in addition to asking a direct question of the doctor, a resume of the evidence regarding the patient's condition and the treatment given was made and this took a hypothetical form. The appellant, by interrupting the course of questioning, added elements of fact which he deemed essential to the question. It is clear that Dr. Cherry's answer was based upon all of the facts in the case. “. . . but to the question Mr. Ryan asked, including all the other statements made, I still have to say that the treatment was not correct; it was not what should have obtained . . .” (Tr. 245)

There can be no doubt as to the treatment meant by Dr. Cherry in his answer stating “that the treatment was

not correct . . ." (Tr. 245). The testimony as given shows that this could only refer to the act of malpractice which the witness had just defined, that is, the improper treatment in Portland. This was undoubtedly understood by all concerned and was not misleading. See in this regard *Carnine v. Tibbets*, supra, at p. 37.

The cases above cited guided counsel in the trial of the case and testimony was well within the rules therein announced.

ANSWER TO POINT 4

The Court did not err in finding that the appellant, in treating appellee, failed to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon, and like communities in the treatment of the comminuted compound fracture of the left tibia.

ARGUMENT

Appellee's argument in support of Point IV of its assignment of error is repetitious. Previously in this brief, it is felt that it has been amply demonstrated that there was malpractice and that the treatment afforded Morin in Portland was not proper practice; and that appellant failed to exercise the degree of care and skill ordinarily exercised by physicians in Portland, Oregon and like communities in similar cases.

Drs. Cherry, Walker and Berg all seem to be in complete concurrence as to the usual and proper treatment to be given a compound fracture such as the one suffered by Morin. Prompt, immediate and adequate care within six to eight hours was the indicated treatment and the experts all agree with each other as to this as a rule of treatment. Previously we have shown that there is no evidence in the record to justify an exception from the rule.

The cases cited by appellant in his argument under Point IV of its assignment of error do not support appellant's contentions. On the contrary, these cases demonstrate that the trier of facts herein properly determined the question of malpractice and proximate cause. For example, in the case of *Malila v. Meacham*, 187 Or. 330, 211 P. 2d 747, where a dentist was held liable for malpractice for the extraction of a tooth in the presence of active trenchmouth, it was held that where there was expert testimony as to the impropriety of the defendant's treatment of the plaintiff, the Court could not say as a matter of law that the defendant was guilty of nothing more than an error of judgment. It held that where there was a difference of opinion among the experts as to the fact, the question should be submitted to the jury. The evidence in the case at bar demonstrates that the treatment given was not proper. Further, that if there was judgment exercised, it was completely lacking in skill, knowledge and diligence with particular emphasis on the failure to give care.

It can hardly be said that skill, knowledge or care has been given to a case of this kind by the attending physicians and the consultant when the evidence clearly shows that they did not visit the patient until at least twenty hours had elapsed after his reception at the hospital and that upon belatedly calling at his bedside, even then failed to examine the wound or take any further steps for his immediate care.

The two cases relied upon by appellant in support of Point IV of its assignment of error, both the *Malila* case and the case of *Moulton v. Huckleberry*, 150 Or. 538, 46 P. 2d 589, resulted in an affirmation of the judgments against defendants. In both of these cases an issue of fact was submitted to the jury as to whether the defendant was negligent in each instance and whether such negligence was the cause of plaintiff's injury. The statement of plaintiff's expert in each case that the care was not proper. made a jury question of this issue.

A further discussion of the argument directed to this part of appellant's brief seems unnecessary in view of the fact that the argument under this assignment of error is substantially the same as the arguments under Points I and III of the assignments of error which we feel we have already demonstrated to be without merit. The cases cited by appellee in answer to that argument and the rules therein apply equally to this and a reiteration of them will serve no purpose.

ANSWER TO POINT 6

The discussions and arguments heretofore set out in answer to appellant's Points One through Five, are herein adopted in toto in answer to appellant's Point Six. No additional argument is therefore deemed necessary.

ANSWER TO POINT 7

The verdict rendered by the District Court was not excessive.

ARGUMENT

The judgment rendered by the experienced and able trial judge in this case was not excessive and fairly took into consideration the age, occupation, pain and suffering of Morin, and the prognosis made by Dr. Cherry. In addition, the negligence of the appellant resulted in a lengthening of days and months of hospitalization, treatment, pain and suffering by Morin. (Tr. 246)

Morin was suffering pain at the time of the trial "it just hurts, throbs and pains real deep". (Tr. 184) He suffers from fatigue and weakness in his ankle and left leg. He is no longer able to engage in his usual sports and activities.

(Tr. 186) A total of 15 skin grafts, in addition to other surgery, have been performed in an attempt to remedy the present infection and drainage in his leg. (Tr. 183) (Exhibit 10, Record of operation performed during hospitalization in the United States Veterans' Hospital; Registration numbers 87273 and 89738.)

A review of comparative judgments and verdicts is not deemed necessary in view of the available literature thereon. Morin is suffering from osteomyelitis which is a condition resulting in sloughing of the bone necessitating frequent operations to keep ahead of it. This condition can result in amputation of the whole limb. (Tr. 301) It is a recurrent disease with painful and disfiguring effects upon the injured leg. (Tr. 249)

The many skin grafts and operations, the long periods of hospitalization, with particular reference to the hospitalization in the United States Veterans Hospital which is detailed in Exhibit 10, not only shows the course of treatment, but reflects the suffering, inconvenience, fear and misery, with attendant financial loss, faced by this formerly active and healthy man. It is submitted that the evidence amply supports the judgment as given and that while the judgment is adequate it is conservative in the light of the past suffering and obvious future difficulty faced by the appellee.

ANSWER TO POINT 8

The Court did not err in finding that the appellee would be required to undergo further operations.

ARGUMENT

The arguments and review of the evidence supporting the judgment of the court in the amount given adequately refutes this contention of the appellant and we feel that further argument directed toward this assignment of error is unnecessary. It is sufficient to indicate that in the language of R. M. Berg, M.D., appellant's own witness, the condition was characterized as "a chronic osteomyelitic process". (Tr. 394). This condition is recurrent and the necessity for future surgery as the only available remedy is amply indicated by the past course of treatment and the prognosis given. (Tr. 249)

Dr. Berg's report of examination is erroneously labeled as Plaintiff's Exhibit No. 25 starting at page 389 of the Transcript of Record whereas it is actually Defendant's Exhibit No. 25 (Tr. 104).

Also, Appellant's witness, Dr. Leonard, when questioned by the Court on the effect of osteomyelitis, said it results in sloughing of the bone, that sometimes frequent operations are necessary to keep ahead of it and that amputation of the limb may have to be considered. (Tr. 300, 301.)

CONCLUSION

The foregoing review of this case shows that the preponderance of the evidence supports the findings of the facts of the experienced trial judge. His opportunity to judge the credibility of the witnesses, to evaluate the testimony and to relate it to the exhibits in reaching his determination should be given the credence and effect intended by Rule 52A, Federal Rules of Civil Procedure. It should be noted that the cases selected by the appellant to justify its right to ask this court to overrule the findings of the trial judge are peculiar in nature in that they were equity procedures. *Sbicca-Del Mac, Inc., v. Milius Shoe Co.* (CCA 9), 145 F. 2d 389, 395, relied upon by appellant is a patent infringement suit. The court is well aware that in suits of this type where extrinsic evidence is not needed for the purpose of explanation or valuation and where a mere comparison of structures is sufficient to determine the issues, an exception to the usual effect given the trial court's findings exist. "Findings in the Light of the Recent Amendments." 8 F.R.D. 271 Yankwich, Leon R. showing patent cases are considered as an exception.

The cases cited by appellant are best answered by referring the court to the cases holding that it is not clearly erroneous under Rule 52A of the Federal Rules of Civil Procedure for the trial court to choose between two conflicting views as to the weight of the evidence. *Bjornson v. Alaska Steamship Co.* CA 9th, 193 F. 2nd 433; *City of*

Portland v. Luckenbach S. S. Co. CA 9th, 1955 A.M.C. 6, 10; *Carr v. Yokahoma Speicie Bank Ltd.* CA 9th, 200 F. 2nd 251.

There is substantial evidence, indeed evidence to which essentially there is no contradiction as to the fault of the appellant in this case and the burden of proof was carried and sustained both as to negligence and causation.

With regard to the burden of proof and the evidence to sustain it in an action for malpractice, the Oregon Supreme Court has said:

"Consequently, the plaintiff in an action in malpractice has the burden of proving that the conduct of the defendant in his treatment of his patient did not measure up to the standard thus prescribed, but it does not follow that the proof must be in the words of any particular formula. If the medical witness testifies in substance to what amounts to a failure of the dentist to conform to the standard, that ought to be sufficient. The question, therefore, is whether an opinion of a qualified medical expert that a given treatment was not proper does, in substance, constitute evidence of such fault. We think it should be so held." *Malila v. Meacham*, 187 Or. 330, 336.

The evidence is overpowering that the appellant's physicians in Portland, both individually and collectively, failed to give Morin the proper, expected and required treatment and that Morin's disability, disfigurement, pain and suffering with the consequential financial and personal effects thereof, were the result of this "gross inattention".

Respectfully submitted,

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No. 14628

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division, The Honorable James M. Carter, Presiding.

APPELLANT'S OPENING BRIEF.

FILED

JUN 18 1955

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No. 14628
IN THE
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NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division, The Honorable James M. Carter, Presiding.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

Appellant was convicted and sentenced to four years imprisonment by the above entitled District Court, on December 13, 1954, for violation of the Universal Military Training and Service Act (50 Appx. U. S. C. A., Sec. 456(j)), in that he failed to report for civilian employment as directed by the Selective Service Director. A notice of appeal was filed by appellant on the day of his judgment of conviction.

Jurisdiction of this cause is invoked by Section 1291 of Title 28, Federal Judiciary Code, and Rule 37 of the Federal Rules of Criminal Procedure.

Preliminary Statement of Fact.

Appellant, who at the time of conviction, was twenty-three years of age,¹ was born and raised in the religious faith of the Molokan Holy Spiritual Jumpers, commonly referred to as the *Molokans*. This religious sect has historically and traditionally opposed war and military service in any form, although it has endured hardship, persecution and even exile (from Russia) by its adherence to this belief.²

In February, 1951, appellant received a 1-A classification from his local draft board³ which he appealed administratively on religious grounds.⁴ As a result, his classification was ultimately modified by the Appeal Board, and he was granted status as a 1-A-O (non-combatant military service).⁵ Further efforts to appeal the latter classification were unsuccessful, and when finally ordered to report for military duty, appellant refused.⁶ Consequently, appellant was indicted and tried in the District Court for the Southern District of California for failure to report for induction, but appellant was acquitted upon the ground that the classification (1-A-O) had no basis

¹See: Selective Service File, page 2 (hereinafter referred to as SSF-[page number]).

²Thomas: *The Conscientious Objector in America*, pp. 50-54, 149-155, 189-191.

³SSF-11

⁴SSF-11, 19.

⁵SSF-56.

⁶SSF-11.

in fact.⁷ Thereafter, on November 18, 1953, appellant was reclassified 1-O, which classification has not since been altered or modified.⁸

On June 7, 1954, following his reclassification to 1-O, appellant was ordered to report to the Draft Board on June 21, 1954, for assignment to the Los Angeles County Department of Charities as an institutional helper in lieu of induction.⁹

In the meanwhile, other events running parallel to the above mentioned incidents combined to affect appellant's draft status in other respects.

In December, 1952, appellant's father died, and appellant assumed the responsibility for his mother's support.¹⁰ Later, shortly after his acquittal in November, 1953, appellant married, and learned several months later that his wife had become pregnant.¹¹

Accordingly, on April 14, 1954, appellant notified his local draft board of these facts, and requested a III-A classification (dependency deferment).¹² The Board refused to reopen the case or reclassify appellant,¹³ whereupon, on June 15, 1954, he addressed a communication "to

⁷*United States v. Klubnikin*, No. 22956-CD (decided Nov. 4, 1953). See, also: Transcript of Record (hereinafter referred to as TR) at p. 17.

⁸SSF-11.

⁹SSF-108.

¹⁰SSF-118.

¹¹SSF-118. Appellant has been a father since November, 1954.

¹²SSF-99. See p. 13, *infra*.

¹³SSF-101.

the members of Local Board No. 114," which reads in pertinent part:

"Dear Sirs:

I am appealing to you members of Local Board No. 114 in request for a cancellation of the report for civilian work . . . ,"¹⁴

assigning the aforementioned facts relating to his family status in support of his appeal. The Board replied the following day, however, as follows:

"Dear Sir:

This will acknowledge receipt of your request for a dependency deferment. The information has been reviewed by this Local Board and it is of the opinion that the facts presented do not warrant the reopening or reclassification of your case at this time"¹⁵

Pursuant to its above-mentioned Order of June 7, 1954, appellant appeared at the Local Board on June 21, but refused to accept his assignment.¹⁶

The instant proceedings, culminating in his conviction, were the outgrowth of that refusal.

¹⁴SSF-117.

¹⁵SSF-119.

¹⁶SSF-120, 122.

Issues Involved.

I.

Was appellant afforded an opportunity to appeal the Local Board's refusal to reopen his classification; and if not, did this constitute a denial of due process of law?

II.

Did the failure of the Local Board to treat the appellant's request for change of classification result in a deprivation to him of due process of law?

III.

Is Section 1622.30 of the Selective Service Regulations unconstitutional as an unreasonable classification?

IV.

Is the decision of the Local Board refusing to reopen and reclassify without basis in fact?

V.

Is the order of the Local Board assigning appellant to a local civilian employment invalid as an unlawful exercise of authority?

VI.

If the Answer to Point V is in the negative, then is the authority upon which the order rests constitutional?

ARGUMENT.

I.

The Local Board's Refusal to Reclassify Appellant Constituted a Denial of Due Process of Law in That He Was Not Afforded an Opportunity to Appeal the Board's Decision.

It is the contention of appellant, first, that the Selective Service Regulations make no provision for appeal from a refusal of a Local Board to reopen a classification, and hence, deprive appellant of an essential element of due process.

As indicated previously, shortly prior to April 14, 1954, appellant learned of his wife's pregnancy. At that time, he was also supporting his mother (whose hearing was apparently impaired).¹⁷ Therefore, he applied on that date for his draft board for reclassification to III-A.¹⁸ A day or so later, the Board wrote back its decision not to reopen his draft status.

No classification is permanent (Selective Service Regulations, Sec. 1625.1(a)).¹⁹ Moreover, a registrant is entitled to the lowest classification for which he is eligible (Regulations, Sec. 1623.3).

Nevertheless, the appellant was unable to appeal from the Local Board's refusal to reclassify him.

¹⁷SSF-117, 118.

¹⁸SSF-99.

¹⁹Title 32, Code of Federal Regulations. Hereafter, for brevity and convenience, reference will be made simply to the Regulations.

Section 1625 of the Regulations is devoted to the subject of reopening classifications. Thus, Section 1625.13, relating to appeals, states:

“Each *such* classification shall be followed by the same right of appearance before the Local Board and the same right of appeal as in the case of an original classification.” (Italics ours.)

In the context of the section as a whole, however, it is obvious that the quoted portion refers only to “such classification(s)” as are reopened, and not those where the Board has declined to reopen and reconsider.²⁰

As a matter of fact, this view is clinched by the subtitle to that section, which reads:

“RIGHT OF APPEAL FOLLOWING REOPENING OF CLASSIFICATION.”

The only other regulation form providing for an administrative review procedure is Section 1624.2(e),²¹ the relevant part of which says:

“Each *such* classification or determination not to reopen the classification made under *this* section shall

²⁰The two sub-sections immediately preceding sub-section 1625.13, for example, spell out the procedure following the reopening of classifications. Once a classification has been reopened, the registrant must be classified even though he receives the same classification; and he is entitled to notice and right of appearance as if it were an original classification. (Section 1625.12.) Strictly speaking, there is neither a classification nor a re-classification upon the board's refusal to reopen. Thus, the term “such classification” in subsection 1625.13 can only pertain to actual classification procedure.

²¹A third appellate procedure is offered by Section 1626.1 *et seq.* of the Regulations. But the procedure is restricted to appeals from classification, and can be utilized only when a Notice of Classification is sent to the registrant. Since appellant was not classified at this point, this section is patently inapplicable.

be followed by the same right of appeal as in the case of an original classification.” (*Italics ours.*)

But this section is wholly unrelated to the regulations previously discussed, or to the issues in this case. The phrase “this section” as used in Section 1624.2(e) refers to the procedure available following a personal appearance before the Local Board. Under Section 1624.2(b), a registrant may appear before the Board to present additional information relevant to his status. He is entitled to a personal appearance, however, only within ten days after the Local Board has mailed him a Notice of Classification (Regulations, Sec. 1624.1(a)).²² If, following the registrant’s personal appearance, the Board determines not to reopen his classification, then Section 1624.2(e) comes into operation. The phrase “such classification or determination” takes on this special context.

Now, it is significant that a form No. 110 (Notice of Classification) was last sent to appellant by the Board on November 18, 1953.²³ This was prior to the accumulation of events which gave rise to his request for a III-A status. But of equal importance is the fact that, at all times herein, only the Form 110 advised a registrant of his right to appear personally before the Board or otherwise explained appeal procedures.

Therefore, in April, 1954, when appellant first applied for a dependency exemption, he was unable to process an appeal from the Local Board’s refusal to reopen his classification. Furthermore, he could not request a personal appearance from which a determination not to reopen

²²This notice is designated by the Regulations as SS form 110.

²³According to the minutes of his Local Draft Board (SSF-11 A).

might be appealed because the factors comprising his claim to III-A status occurred far beyond the ten day limitation period following his receipt of the Notice of Classification.²⁴

Finally, unlike other registrants who receive an adverse classification upon a form which advises them of their right to appeal, appellant was simply notified of the Board's decision by a letter containing no such information.

Thus, appellant was not apprised of his right to appear before the Local Board in support of his claim (See: *United States v. Giessel* (D. C. N. J.), 129 Fed. Supp. 223; *United States v. Derstine* (E. D. Penna.), 129 Fed. Supp. 117; *United States v. Vincelli* (C. C. A. 2), 215 F. 2d 210, reh den. 216 F. 2d 681; *Herrett v. United States* (C. C. A. 9), 216 F. 2d 659). He was unable to process an appeal from the Board's refusal to reopen his classification (*United States v. Derstine* (E. D. Penna.), 129 Fed. Supp. 117; *Compare: Cox v. Wedemeyer* (C. C. A. 9), 192 F. 2d 920, 923). And he could not request a personal appearance, which, if allowed, would have created a right to appeal from the Board's refusal to reopen (Regulations, Sec. 1624.2. *Compare: United States v. Vincelli, supra*).

The effect of the Selective Service Regulations upon appellant is clear. For all practical purposes, appellant's classification is permanent, notwithstanding Section 1623.3 and 1625.1(a) of the Regulations. Though manifestly entitled to at least a hearing, if not to a reclassification, appellant nonetheless has no procedural means by which to

²⁴See: Section 1624.1(a) Regulations.

secure a review of the Board's refusal to reopen his classification. If the Board's classification is arbitrary or capricious, it may yet stand because no appellant authority is willing or able to pass upon it. On the other hand, other registrants whose dependency status is no different than appellant's are at least afforded the opportunity of administrative review where the local board has in fact reopened, or where the registrant has received his Notice of Classification, or has been allowed to appear personally in support of his claim.

In *Dickinson v. United States*, 346 U. S. 389, the Supreme Court set aside the classification of a local board which was contradicted by unrefuted evidence, and had no basis in fact (see also: *Cox v. Wedemeyer*, 192 F. 2d 920, where the petitioner had "deserted" the army in time of war). Here, however, the Board does not simply refuse to reclassify appellant, but indeed, declines to even entertain the claim.

"A registrant who fails to have a fair chance for his proper classification on his appearance before the local board has been denied due process of law." (*Franks v. United States* (C. C. A. 9), 216 F. 2d 266, 270.)

If it is true that a registrant is entitled to the lowest classification for which he is eligible (Regulations, Sec. 1623.2), then correlatively, the Board has a continuing duty to consider a claim for deferment on its merits, at least where it is not patently frivolous. In *United States v. Vincelli*, 215 F. 2d 210, the second circuit held that a draft board *must* reopen a classification in order to make:

"An inquiry designed to test the asserted facts sufficiently to give the Board a rational base on which to put its decision." (At p. 213.)

Moreover,

“ . . . if a change of status was disclosed, it was the duty of the Board to take it into consideration and to *classify* him in the light of the new evidence presented.” (*Brown v. United States* (C. C. A. 9), 216 F. 2d 258, 260.)

Appellant has a right to be heard on facts affecting his draft status which arise subsequent to his classification (*Brown v. United States* (C. C. A. 9), 216 F. 2d 258, 260; *Knox v. United States* (C. C. A. 9), 200 F. 2d 398); and the Local Draft Board has the obligation to consider this new information (*Davis v. United States* (C. C. A. 6), 199 F. 2d 689; *Cox v. Wedemeyer* (C. C. A. 9), 192 F. 2d 920).

II.

The Local Board's Failure to Treat Appellant's Second Request for Change of Classification as an Appeal Was a Denial of Due Process of Law.

In order to foreclose any argument regarding appellant's alleged failure to exhaust his administrative remedies, and simultaneously, to point up the arbitrary and capricious position of the Local Board respecting appellant's dependency claim, we next consider what steps the appellant did take to have that claim reviewed.

Appellant's letter of April 14, 1954, contained the following pertinent language:²⁵

“Dear Sirs:

. . . there have come about certain events under which I am appealing for a 3-A classification. This

²⁵SSF-99.

new evidence has arisen since the time of my last classification . . .

* * * * *

Awaiting your decision on my appeal for a 3-A classification.

Respectively (*sic*) yours,
Nick Allen Klubnikin, Jr."

This request was peremptorily denied by the Draft Board the following day.²⁶ Thereafter, appellant addressed his letter of June 15, 1954, as follows:²⁷

"To the members of Local Board No. 114:"

and wrote in pertinent part as follows:

"Dear Sirs:

I am appealing to you members of Local Board No. 114 in request for a cancellation of the report for civilian work (*sic*) . . ."

The balance of the letter elaborates upon the reasons for his request for III-A classification (the nature of which has been discussed heretofore). Nonetheless, the Local Board treated this letter merely as a second application for dependency deferment rather than as an appeal.

The Regulations expressly provide for liberal construction "of any such notice" so as to permit appeal. Indeed, Section 1626.11 of the Regulations states:

"Such notice (of appeal) need not be in any particular form but must state the name of the registrant and the name and identity of the person appealing so as to show the right of appeal."

²⁶SSF-101.

²⁷SSF-116-118.

It thus appears that the only condition for perfecting appeal (aside from time limitations) is identification of the appellant and of the registrant, both of which requirements were met here.²⁸

“Registrants are not thus to be treated as though they were engaged in formal litigation, assisted by counsel.”

United States v. Craig (C. C. A. 3), 207 F. 2d 888, 891.

Accord:

United States v. Derstine, 129 Fed. Supp. 117.

But of equal, if not greater significance, is the fact that historically the Local Board treated other similar communications of appellant as appeals. For example, on February 7, 1951, the Board received the following letter from appellant:²⁹

“February 15, 1951

“Gentlemen:

In reply to your letter of February 15, 1951, which placed me in a 1A class, I am reminding you again of my Religious Objection to participation in war (*sic*) in any form. I can't understand your decision in arriving at a 1A classification, since I have informed you fully of my religious convictions.

I am reminding you once again of my stand, and I claim a 4E classification based on my religious training. Thank you.

Sincerely yours,

NICK ALLEN KLUBNIKIN.”

²⁸In both letters, for example, the appellant's signature is plainly written, and the use of the first person singular indicates that the author is also the registrant.

²⁹SSF-19.

Despite the absence of a request that the letter be considered an appeal; despite the absence of even the term “appeal,” the Board treated the letter as just that.³⁰

Again, on August 14, 1952, appellant wrote his Draft Board another letter, which read, in part:³¹

“Letter of Appeal

August 14, 1952

To the Members of Local Board 114:

In reference to the . . . (1-A-O) classification
you have given me . . . I am appealing for a
religious conscientious objectors classification . . .

* * * * *

I again appeal for a classification of a religious
conscientious objector.

Sincerely,

NICK ALLEN KLUBNIKIN.”

This communication, which bears a striking resemblance to appellant’s letter of June 15, 1954, was also regarded by the Board as an appeal,³² and was so designated in its minutes.^{32a} Hence, the Government is hardly in a position to now argue that appellant failed to exhaust his administrative remedies. Appellant went as far as he could go; the captious and unreasonable conduct of the Local Board precluded further recourse.

³⁰SSF-11.

³¹SSF-57.

³²SSF-11.

^{32a}SSF-11A.

III.

Section 1622.30 of the Selective Service Regulations Is Invalid as an Unreasonable Classification, and the Draft Board's Refusal to Entertain Appellant's Dependency Claim Constituted a Denial of Due Process of Law.

Sections 1622.30 (a) and (b) are the dependency deferment sections, and are set out more fully in Appendix "A." In substance, paragraph (a) of this section exempts only those registrants who prove fatherhood, prior to August 25, 1953. This provision, then, has two effects: First, a registrant with one child born prior to August 25, 1953 is deferred, while a father who may have three or four children after that date must still serve unless he can otherwise establish hardship. This seems to have no rational basis, and it is submitted that if the Local Board rested upon this Regulation in refusing to reopen appellant's classification, its decision was arbitrary and capricious, and without basis in fact.

Additionally, the date line not only unreasonably and arbitrarily discriminates among fathers, but is an immoral classification in that it

" . . . invades the most sacred precinct of family life at a time when there should be the most complete mutuality between the spouses and in face of nature's most demanding and significant urge in nature's scheme for propagating the species. . . ."

Talcott v. Reed (C. C. A. 9), 217 F. 2d 360, 363.

While the issue advanced here has not been passed upon by any court so far as is known to appellant, at least

three cases have involved administrative directives affecting family life. In the *Talcott* case, just quoted, a Regulation provided that a change in status would not produce a change in classification (under certain conditions not important here) unless such newly acquired status resulted from "circumstances over which the registrant had no control." (Regulations, Sec. 1625.2.) Bulletin No. 57 was issued by the Director of Selective Service, providing that

" . . . Pregnancy is a status over which the registrant does have control, and it is therefore not a claim which can be classified under 'hardship' . . . beyond the registrant's control."

This court held that Bulletin "morally and legally wrong" for the reasons just quoted. (*Talcott v. Reed*, *supra*.)

Similarly, in *United States ex rel. Barriel v. Clement*, 101 Fed. Supp. 349, a District Court struck down a resolution of a Local Board which had "the effect that registrants who married after July 7, 1950, would not be considered for deferment except in extreme hardship cases."³³ Compare with *Mintz v. Howlitt*, 207 F. 2d 758 at 760, where the Second Circuit commented:

"But we find nothing in the Selective Service Regulations which in any way justifies a local board in inquiring into the nature of a pregnancy to determine whether it is 'an effort to escape induction' or is otherwise to be frowned upon. Such an inquiry would surely be weird, if not against public policy, and seems clearly against the spirit of the Regulations."

³³The Court found, however, that the resolution was in conflict with the Regulations.

It is respectfully submitted, therefore, that a construction of Selective Service Regulation, Section 1622.30(a) by the Local Board which differentiates appellant from fathers with children born prior to August 25, 1953; and which tends to corrupt appellant's family relationship, is an unreasonable classification, and a denial of due process of law, and in fact, clearly exceeds the intent of Congress to let the burdens of Selective Service fall equally and fairly upon all.

IV.

The Refusal of the Local Board to Reclassify Appellant Was Without Basis in Fact.

Appellant was at no time afforded the opportunity to appear personally upon the merits of his claim, or to offer additional evidence to substantiate his request for reclassification. But the record is barren of the grounds for this refusal, and the evidence of hardship to appellant has at no time been refuted or contradicted. Thus, the Board has no rational basis upon which to rest its decision. (See: *United States v. Vincelli* (C. C. A. 2), 215 F. 2d 210, reh. den., 216 F. 2d 681.)

However, the District Court below seemed to question the sincerity of the dependency claim in view of the recency of its presentation. [TR 25-26, 44.) It is conceivable that this is the motive for the Board's refusal to reopen as well.

What the Court may have overlooked, however, was the relative recency of the events which combined to render appellant eligible for the III-A classification. His mother became a widow in December, 1952, and thereafter he assumed responsibility for her care. But in November, 1953, appellant acquired an additional (albeit pleas-

ant) obligation of a wife, and in March or April of 1954, he first learned of his wife's pregnancy.

It was the *combined* presence of these factors which compelled appellant to seek reclassification. In any event, there is no evidence to suggest that the claim was advanced in bad faith, or was other than the coincidence in point of time. A similar coincidence was present in *Dickinson v. United States*, 346 U. S. 389, and in *Brown v. United States* (C. C. A. 9), 216 F. 2d 258, but both Courts held that suspicion cannot support a draft classification. (See also: *Schuman v. United States* (C. C. A. 9), 208 F. 2d 801, 804.)

Besides, if in fact the appellant is eligible for III-A classification, his motive for seeking it is immaterial. It is presumed that one claiming an exemption or deferment is seeking to avoid military service, albeit lawfully. In fact, this is the purpose of the exemption provisions.

Furthermore, a belated application for a new classification, notwithstanding the misgivings it may invite, has usually been awarded the same consideration by the Courts as any otherwise meritorious claim. (*Dickinson v. United States*, *supra*; *Brown v. United States*, 216 F. 2d 258; *Schuman v. United States* (C. C. A. 9), 208 F. 2d 801; compare: *United States v. Geissel*, 129 Fed. Supp. 223.) In the *Dickinson* and *Brown* cases, the registrants were elevated to ministerial status while induction hovered over them. In *Schuman*, the registrant originally gave his occupation as a student, but just two months prior to his notice of induction, he notified the Board of his affiliation

with the Jehovah Witnesses sect, and claimed ministerial and conscientious objector status. The Court answered the argument of untimely claim at page 805:

“When the uncontroverted evidence supporting a registrant’s claim places him *prima facie* within the statutory exemption, dismissal of his claim solely on the basis of suspicion and speculation is both contrary to the spirit of the act and foreign to our concepts of justice.”

Again, in *Giessel*, time for appeal had expired, but the Court refused to convict where the administrative proceedings lacked due process of law.

In sum, the Local Board’s refusal to at least reopen appellant’s classification is a decision without rational basis in fact. Under Section 1622.30(b) of the Selective Service Regulations, appellant presented a *prima facie* case of extreme hardship which would inure to his mother, wife and child as a result of his induction. The Board did not permit appellant the simple right of a personal appearance, nor did it trouble itself to even inquire further into appellant’s new status. Moreover, the Board’s hasty disposition of appellant’s request raises an inference that the matter was not even carefully considered by the Board.

“The test of whether a draft board’s action may be attacked is whether it receives and considers what a particular registrant submits.”

Davis v. United States (C. C. A. 6), 199 F. 2d 689.

Under the foregoing circumstances, it is respectfully submitted that the order of the Local Board denying appellant the reopening of his case, and reclassification is void for want of due process of law.

V.

The Order of the Local Board Assigning Appellant to Local Civilian Employment Was an Unlawful Exercise of Authority.

A. The Employment to Which Conscientious Objectors Are Assigned Must Fall Within Federal Jurisdiction.

In a word, appellant was assigned by the Local Draft Board to perform civilian work, in lieu of military service, in the Los Angeles County Department of Charities, an agency of the Los Angeles County government. For refusing to do this work, appellant was indicted, prosecuted and found guilty.

The purported authority for this order rests on Section 456(j) of the Universal Military Training and Service Act, which provides, in part:

“if he is found to be conscientiously opposed to participation in (combat or) non-combatant service, in lieu of such induction, (he shall) be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety or interest as the local board may deem appropriate”

Section 1660.1 of the Regulations defines “appropriate civilian work” as *limited to*:

“(1) Employment by the United States Government or by a State, territory, or possession of the United States, or by a political subdivision thereof
. . . .

“(2) Employment by a non-profit organization, association or corporation which is primarily engaged

either in charitable activity conducted for the benefit of the general public . . .” (Italics supplied.)

Congress, however, provided expressly that the work to be performed by conscientious objectors was to contribute to the *national* health, safety and interest. Yet, here we find a local board directing appellant to civilian employment within a wholly local establishment.

Now the word “national” as used in Section 456(j) has very clear and meaningful connotations. Black’s Law Dictionary, 3rd ed., describes the term as:

“pertaining or relating to a nation as a whole: commonly applied in American Law to institutions, laws, or affairs of the United States or its government, as opposed to those of the several states.” (P. 1221.)

Moreover, the term has distinctive uses and application such as, “national parks” as distinguished from “state parks”; “national” and “state” labor relations boards; “national” banks and “state” banks; etc. (See: *Words and Phrases*, Vol. 28, pp. 2125.) Additionally, it is a crime for a business or a firm to use the word “national” in its name except as permitted by law (18 U. S. C. A., Sec. 709). In *Byers v. United States* (C. C. A. 10), 175 F. 2d 654, cert. den. 338 U. S. 887, it was held that courts may take judicial notice of the fact that a bank with the word “national” in its title is one organized under the laws of the United States.

B. The Board's Assignment of Appellant to Employment With the Los Angeles County Department of Charities Was Arbitrary and Capricious.

Aside from failing to meet the standard of work set up by Congress, the assignment itself was arbitrary. The Local Board failed to consider, and by virtue of the Regulations, it could not consider, whether in fact appellant's pre-induction employment contributed to the national health, safety and interest.

As a matter of fact, the Selective Service Regulations treat conscientious objection as a punishment rather than as a way of life to be fitted within the American concepts of fair play and religious freedom. For example, Section 1660.21 prohibits the performance of civilian work in the community where registrant resides. Apparently it is felt that if a soldier must surrender his home to join the army, so must a conscientious objector. Nonetheless, Congress has recognized conscientious objection as a valid religious concept. In providing for civilian employment, Congress probably reasoned that the conscientious objector could furnish the source of labor which could be used to fill the gaps with a large standing army necessarily left. It is unnecessary to suspicion that Congress intended to withdraw the recognition it gives to the conscientious objector by imposing upon them a different form of military, or semi-military duty.

A serious question is raised as to the validity of regulations which deliberately and arbitrarily preclude appellant from his current occupation at least without a showing that such work does not contribute to the national health, safety and interest.

VI.

Section 456(j) of the Universal Military Training and Service Act Is Unconstitutional in That It Violates the First, Thirteenth and Fourteenth Amendments to the Federal Constitution.

A. The Universal Military Training and Service Act as Construed and Applied to Appellant Calls for Non-Federal Labor Draft in Violation of the Thirteenth and Fourteenth Amendments.

Appellant submits that unless the Act and Regulations are construed as suggested under Point A, above, an alternative interpretation renders Section 456(j) of the Universal Military Training and Service Law unconstitutional.

While appellant may be conscripted, he cannot be compelled by Congress to work for a private employer, or even in non-federal public employment. True, many cases seem to hold that Congress may prescribe civilian employment in lieu of military service. But by and large, those cases involved work at a public service camp which were created and operated at the expense of the federal government. (*United States v. Brooks*, 54 Fed. Supp. 995; *affirmed*, *Brooks v. United States*, 147 F. 2d 134, *cert. den.* 324 U. S. 878; *Weightman v. United States*, 142 F. 2d 188; *Hopper v. United States*, 142 F. 2d 181; *United States ex rel. Zucker v. Osborne*, 54 Fed. Supp. 984.) Even though some of the camps may have been run by religious groups, they were nonetheless federal camps, under federal control, administered by and through federal regulations promulgated by General Hershey, Director of Selective Service. Thus, the religious organizations were mere agents of the government.

In the instant case, the national government exercises no control whatever over the activities of the Department of Public Charities.

Under the rules established in *Pollack v. Williams*, 322 U. S. 4, there can be no indirect violation of the Thirteenth Amendment; criminal sanctions cannot be imposed against those refusing to do forced labor. By analogy, the war powers cannot be utilized to compel performance of a service not of an exceptional character.³⁴ If the service has no direct relation to the war effort, it is not an employment which may be required of appellant, regardless of whether it be private or non-federal public.

In *United States v. Copeland*, 126 Fed. Supp. 734, the District Court for Connecticut, in passing upon the question of whether an assignment to a private employment was valid, held that it was not, and ruled the Regulations in this respect unconstitutional. The analogy here is obvious. Even though appellant was assigned to a governmental employer, the effect was no different than if the employment had been of a non-public character. In either case the federal government is going beyond the sphere of permissible federal activity, and rather infringes upon matters of strictly local concern.

³⁴As, for example, authorization of a justice of the peace to issue warrants to arrest deserting seamen, an exception which finds long established custom and practice rooted in the common law.

B. Section 456(j) of the Universal Military Training and Service Law Requiring Appellant to Enter Civilian Employment Not of His Own Choosing in Lieu of Military Service Is an Unconstitutional Trespass Upon Appellant's Religious Liberty.

The mandatory employment requirement is unconstitutional in that it allows liberty to those only whose conscience will permit compliance with its provisions.

In the instant case, appellant is not only opposed to military service, but cannot obey any military order however remote to militarism [see attached hereto, and marked Appendix "B," the copy of the Declaration of the Elders of the Molokan Church, the original of which was filed with the court below—see TR 13]. There can be no question of the appellant's sincerity and his good faith (see: report of hearing officer, Selective Service File, pp. 54-55). He has stood fast to his convictions fully cognizant of the implications of his position. To gain his freedom, he must purchase his conscience. For those whose price is less, this law may serve a boon. For appellant, in time of peace, it is a two-edged sword, a weapon of war.

Appellant was within his constitutional rights to refuse to submit to governmental authority when he was directed to perform an act antagonistic to his conscience and religious scruples. (Dissent of Justice Hughes, in *United States v. MacIntosh*, 283 U. S. 605, 627; *Girouard v. United States*, 328 U. S. 51.)

Yet, where Congress has provided legislative sanctuary for those opposed to military endeavor *in any form*, is it not in the furtherance of Congressional intention to accede to religious conscience in this case? Both Congress and the Courts have recognized that citizens may defend and support the Constitution in varying ways other than the bearing of arms. (*Girouard v. United States, supra.*) Appellant's position should not be construed as a challenge of governmental authority or power. We in this country have been ever mindful of the dignity and freedom of the individual. This, then is an assertion of an individual's dignity. It is a recognition of the principles of religious tolerance which have recommended this nation to the envy of the free as well as the enslaved.

Conclusion.

For the foregoing reasons, appellant respectfully submits that the judgment of conviction of the District Court herein should be reversed in that it rests upon an invalid and an unconstitutional order.

Respectfully submitted,

A. L. WIRIN,

HUGH R. MANES,

Attorneys for Appellant.

APPENDIX A.

CLASS III

1622.30 Class III-A: Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship and Privation to Dependents.—(a) In Class III-A shall be placed any registrant who prior to *August 25, 1953*, has submitted evidence to the local board which establishes to the satisfaction of the local board that he has a child or children with whom he maintains a bona fide family relationship in their home. Such a registrant shall remain eligible for Class III-A so long as he maintains a bona fide family relationship with such child or children in their home.

(b) In Class III-A shall be placed any registrant whose induction into the armed forces would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith; provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.

APPENDIX B.

To the Government of the United States--The Department of Justice.

THE FIRST AMENDMENT TO THE BILL OF RIGHTS.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of people peaceably to assemble and to petition the Government for a redress of grievances.

The Holy Spirit has been the Guiding Force for the Molokan Spiritual Christian Holy Jumpers ever since through the gracious mercy of our Lord Christ, they received, accepted, and inherited in 1830 what Jesus said in St. John Chapter 15 Verse 26, "But the Comforter which is the Holy Ghost whom the Father will send in my name, he shall teach you all things to your remembrance (*sic*) whatsoever I have said unto you." We are followers of the prophets and followers of the dictate of the Holy Spirit in each man as it moves him. Our religion is a faith led by the Holy Spirit, powered by the Holy Spirit, and counselled by the Holy Spirit.

In the Old World our forefathers went through unbelievable (*sic*) persecutions for fulfilling the dictate of the Holy Spirit. We have authentic book of prophecy, (*sic*) "Spirit and Life" in which are all the detailed struggles of our leaders led by the Holy Spirit.

We are Spiritual followers of Christ and have authentic proof to the Government the Gift of the Holy Spirit and

why it is imparative (*sic*) for us that you accept our redress for grievances because of the persecution of our young men for following the dictate of the Holy Spirit against 1-0 Service. We are much concerned as to how the Government—Department of Justice—will interpret the laws today and in the future; we are alarmed and cannot withhold (*sic*) our anxiety over their position. We wish to humbly present to you happenings in the base and in case of this young man at the present by Judge James M. Carter for a term of four years. We are presenting the young men of the First War; how they were treated regarding their stand by the dictation of the Holy Spirit. From the book, *The Conscientious Objector in America*, by Norman Thomas, published in 1923 and with introduction by Robert M. La Follette of Wisconsin: pages 50 to 54; 149 to 155; and 189 to 194. We had young men from 1942 to 1946 who through the same Holy Spirit were prosecuted for refusing 4 E Camp Service. Their sentences ranged from six months to two years during the war time and one was before Judge Yankwich who gave him probation.

Now concerning the young man Nick Allen Klubnikin. In his testimony before Judge Carter he said that according to the dictate of the Holy Spirit he cannot accept the 1-0 Service and abide by the order of the Draft Act to perform in leiu (*sic*) of military service. The young man was in full consideration of the seemingly advantageous offer in leiu (*sic*) of military service: his call of the Holy Spirit was one he couldn't deny. Even when Judge

Carter asked if he wanted to appeal his case to a higher court, his answer was negative and the four year sentence did not deter him from his convictions of his faith, to fullfill the dictate of the Holy Spirit. The Church came to his aid to take up the plea to the higher court for justice in this great Promised Land, that God Blessed for religious peoples who had enough persecutions in the Old World.

The Holy Spirit has guided us by prophecy into this Refuge for His people and all those fortunate to be here. The Holy Spirit has proved to us that we must abide to His dictation because there is no Power of knowledge greater than His. Those of our Sect who didn't follow the Holy Spirit were left in the Old World; to meet the fate of famine, hardship, persecutions, extinction, and cruel death of what the Holy Spirit prophesied. The Holy Spirit is not only our religion but the very foundation of our religion. The Father, the Son, and the Holy Spirit are as one. Therefore when we follow the Holy Spirit as He dictates to us we follow the Will of our God, the Lord, Jesus Christ. The Holy Spirit has the esteemed loft in being of importance to the followers of Christ; even higher than the Ten Commandments. If a man breaks a Commandment, upon confession, he is forgiven through the mercy of Christ but regarding the Holy Spirit Christ reminds us in Mathews Chapter 12 Verse 32 "And whosoever speaketh a word against the Son of man, it shall be forgiven; but whosoever speaketh against the Holy Spirit, it shall not be forgiven him, neither in this world, neither in the world to come.

Therefore we, as Elders of the Church, petition for the freedom of the Holy Spirit—Freedom of Religion—and petition for redress of the grievances which we have presented to you concerning our young man. Therefore we plead for justice for this young man, Nick Allen Klubnikin. We ask you to consider the futility of imprisonment and the danger of democracy of persecuting religious belief led by the Holy Spirit.

Sincerely on this day of our Lord, Dec. 30, 1954.

/s/ JOHN W. SUSOFF Minister

/s/ JOHN KLUBNIKIN

/s/ G. W. KLUBNIKIN

/s/ ALEXANDER LUKIANOV

/s/ PHILIP A. SHUBIN

/s/ ANDREW F. SHUBIN

On Jan. 3, 1955, I, the hereby undersigned swear and testify that I witnessed the above signatures.

/s/ WILLIAM A. SHUBIN

William A. Shubin



No. 14628.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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JUL 20 1955

PAUL P. O'BRIEN, CLERK



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No. 14628.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Statement of Jurisdiction.

The Indictment in this case was returned and filed on October 13, 1954 in the United States District Court for the Southern District, Central Division of California, charging the appellant with the violation of Section 462, Title 50, App., United States Code [Tr. pp. 3-6].¹

On November 23, 1954, the cause came to trial before the Honorable James M. Carter, United States District Judge, and at the conclusion of the trial the Court found appellant guilty as charged [Tr. pp. 8, 9].

The Judgment and Commitment following the finding of guilty was filed on December 13, 1954 [Tr. pp. 9, 10].

¹"Tr." refers to Transcript of Record.

Notice of Appeal was filed on December 13, 1954 [Tr. p. 11].

Jurisdiction in the United States District Court was conferred by Section 3231, Title 18, United States Code. Jurisdiction in this Court is conferred by Sections 1291 and 1294, Title 28, United States Code.

Statement of the Case.

The Indictment returned on October 13, 1954, charges that the appellant, a male person within the class made subject to Selective Service under the Universal Military Training and Service Act, was registered with Local Board 114; that pursuant to said Act and the regulations promulgated thereunder appellant was classified in Class I-O and was notified of such classification; that on June 7, 1954 appellant was ordered to report for civilian work contributing to the maintenance of the national health, safety and interest; and, on June 21, 1954 appellant did knowingly and wilfully fail and neglect to proceed as ordered to the place of employment designated in said order, to wit: the Los Angeles County Department of Charities [Tr. pp. 3-6].

On October 25, 1954, appellant appeared before the Honorable James M. Carter, United States District Judge. Appellant at that time waived his right to be represented by legal counsel. After being arraigned appellant offered a plea of *nolo contendere* to the charges contained in the Indictment which offer was rejected by the Court. Thereafter, the appellant standing mute and refusing to plead further, it was ordered by the Court that a plea of not guilty be entered in his behalf. A jury waiver was executed by the appellant which was then approved by the

Court and filed. The cause was set for trial for November 23, 1954 [Tr. p. 7].

On November 23, 1954, appellant appeared in *propria personam* before Honorable James M. Carter for the purpose of trial. Appellant again expressly refused the offer of counsel and elected to act in his own defense [Tr. pp. 12-13]. Trial was held without a jury and appellant was found guilty. The Court ordered that a Motion for New Trial be entered on behalf of the appellant and that said Motion and the matter of the sentence of the appellant be heard on December 13, 1954 [Tr. pp. 8-9].

On December 13, 1954, sentence was pronounced and appellant was sentenced to four years imprisonment [Tr. pp. 9-10]. On the same date appellant moved in the District Court that bail should be fixed pending determination of the proposed appeal. This Motion was denied [Tr. pp. 37-42]. Also on the same date appellant filed a Notice of Appeal [Tr. p. 11].

On January 7, 1955, the District Court denied appellant's renewed Motion for Bail Pending Appeal. The Motion was made on this occasion by the appellant through his counsel of record A. L. Wirin and Hugh Manes [Tr. pp. 43-49].

On January 24, 1955, the United States Court of Appeals for the Ninth Circuit denied appellant's Motion for Bail Pending Appeal.

On February 18, 1955, United States Supreme Court Justice William O. Douglas granted appellant's application for bail on appeal.

Statute Involved.

The Indictment in this case was brought under Section 462 of Title 50, App., United States Code.

The Indictment charges a violation of Section 462 of Title 50, App., United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said section] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

Statement of the Facts.

Nick Allen Klubnikin registered with the Selective Service System on October 14, 1949. He was assigned to Local Board No. 114 located in Long Beach, California [Ex. p. 1].² He was first classified II-A and subsequently was reclassified I-A which classification he

²Exhibit I is a photostatic copy of the contents of the appellant-registrant's Selective Service file. The photostats which constitute Exhibit I are numbered consecutively and these numbers are circled. References in Appellee's Brief refer to the photostat number and not to the page number.

appealed. On August 6, 1952, the Appeal Board classified the registrant I-A-O. He was ordered to report for induction and failed to do so. On July 8, 1953 after trial registrant was acquitted of charges contained in the Indictment alleging the violation of Section 462, Title 50, App., United States Code [Ex. p. 11].

On November 18, 1953 the Local Board recognized registrant's claim that he was conscientiously opposed to participation to combatant and noncombatant training and service in the Armed Forces and classified him I-O [Ex. p. 8].

On November 20, 1953 the Local Board mailed to registrant SSS Form 152 requesting registrant to submit three types of civilian work contributing to the maintenance of the national health, safety, or interest for which he was qualified and offered to perform in lieu of induction into the Armed Forces. The registrant never returned this form [Ex. pp. 11, 11-A].

On December 2, 1953 the Board wrote a letter to registrant advising him of three types of civilian work which were available to him in lieu of induction and requested that he indicate his preference at the bottom of the letter and return the letter to the Board [Ex. p. 74]. The registrant failed to comply [Ex. p. 11-A].

On February 10, 1954 the registrant met with members of the Local Board and a representative of the State Director of Selective Service. At this time the registrant refused the civilian work previously offered him and also declined to suggest any other civilian occupation which might be more appealing to him, stating that he would accept no work [Ex. pp. 78-79].

On April 5, 1954 the registrant was ordered to report on April 13, 1954 for a physical examination. The registrant failed to report [Ex. pp. 11-A, 90].

On April 14, 1954 registrant wrote a letter to the Local Board in which he requested to be classified III-A (dependent deferment). The Board replied to the registrant on April 16, 1954 that after considering the facts contained in his letter his request for reopening or reclassification was denied [Ex. pp. 99-101].

On June 7, 1954 with the approval of the National Director of Selective Service registrant was ordered to report for civilian work. The order recited that he should report to his Local Board on June 21, 1954 where he would be given instructions to proceed to the place of employment [Ex. p. 108].

On June 15, 1954 registrant, in a letter to the Local Board requested the cancellation of the order to report for civilian work and reasserted his claim to a III-A classification [Ex. pp. 117-118]. The Local Board advised the registrant that he should report as ordered [Ex. p. 119].

On June 21, 1954 the registrant reported to the Local Board as ordered and was then and there instructed to report to the Los Angeles County Department of Charities on June 22, 1954 to perform civilian work in lieu of induction [Ex. pp. 120, 122]. The registrant failed to report as instructed [Ex. p. 110].

ARGUMENT.

I.

The Registrant Was Not Entitled to Be Reclassified or to Have His Classification Reopened on April 14, 1954 or June 15, 1954.

A. Reopening of Classification in General.

The Selective Service Regulations imposed the duty upon the registrant to report to the Local Board any fact which might affect his classification within ten days after such fact occurs (Sec. 1625.1(b).)

The regulations provide that under certain circumstances a Local Board *may* reopen and consider anew the classification of the registrant:

“1625.2 When Registrant’s Classification May be Reopened and Considered Anew.—A Local Board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant’s classification,”

It is clear, therefore, that it is left to the *discretion* of the Local Board whether or not to reopen the classification of a registrant upon his presenting facts which might affect his classification. This is demonstrated by the heading of the next section which sets forth the circumstances making reopening mandatory:

“1625.3 When Registrant’s Classification Shall Be Reopened and Considered Anew.”

Whether or not new evidence is of sufficient weight to require the reopening of the case lies within the discretion of the Board.

United States v. Bartelt (7th Cir., 1952), 200 F. 2d 385, 389;

Smith v. United States (4th Cir., 1946), 157 F. 2d 176, 181.

B. The Universal Military Training and Service Act and the Regulations Thereunder Do Not Provide for Extreme Hardship or Dependent Deferments for Registrants Who Are Classified I-O.

Section 456(h) of the Act authorizes the President to prescribe regulations concerning extreme hardship and dependent deferments as follows:

“The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment *from training and service in the Armed Forces or from training in the National Security Training Corps*, (1) of any or all categories of persons in a present status with respect to persons (other than wives alone, except in cases of extreme hardship) dependent upon them for support which renders their deferment advisable . . . ,

* * * * *

“The President is also authorized, under such rules and regulations as he may prescribe, to provide for the deferment *from training and service in the Armed Forces or training in the National Security Training Corps* of any or all categories of persons who have children, or wives and children, with whom they maintain a bona fide family relationship in their homes.” (Emphasis added.)

Section 456(j) of the Act which provides for the exemption of those who are conscientiously opposed to participation in war makes no provision for any deferment for those who are classified I-O and thus already exempted.

“Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, . . . in lieu of induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform . . . such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate.”

It appears, therefore, that Congress did not intend that those registrants in class I-O should be deferred because of extreme hardship or the privation of dependents. Under the 1948 Act the I-W registrant (conscientious objector performing civilian work) is not compelled to be apart from his dependents as is the serviceman or as was the conscientious objector under the former Act. Nor is the civilian work performed by the I-W registrant likely to result in extreme hardship to his dependents, for while he is performing his duty to his country he is able to earn a satisfactory living.

The regulation governing class III-A deferments provides in part as follows:

“1622.30 Class III-A: Registrant With a Child or Children; and Registrant Deferred by Reason of Extreme Hardship and Privation to Dependents.— (a) In Class III-A shall be placed any registrant who prior to August 25, 1953, has submitted evi-

dence to the local board which establishes to the satisfaction of the local board that he has a child or children with whom he maintains a bona fide family relationship in their home. Such a registrant shall remain eligible for Class III-A so long as he maintains a bona fide family relationship with such child or children in their home.

“(b) In Class III-A shall be placed any registrant whose induction *into the armed forces* would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith; provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.” (Emphasis added.)

Subsection (b) of Section 1622.30 clearly contemplates that deferments for extreme hardship shall be limited to those who would otherwise be inducted into the armed forces.

Subsection (a) by its terms would apparently apply to *any* registrant. The Government submits that should not be construed so as to place it in conflict with the Act. However, if subsection (a) were so construed, the registrant here was not harmed by its operation and would have no cause to complain.

C. The Local Board Would Not Have Been Justified in Reopening the Registrant's Case Because of the Assertions Contained in His Letters of April 14, 1954 and June 15, 1954 to the Local Board.

Regardless of whether registrants in general are entitled to an extreme hardship or dependent deferment under the Act the Local Board was correct in refusing to reopen the appellant-registrant's case.

On April 5, 1954 the registrant was ordered to report for a physical examination on April 13, 1954 as a preliminary step to his being ordered to report for civilian work. He did not comply. Then, on April 14, 1954 the registrant for the first time requested a deferment upon the grounds that he was married and was an expectant father, and upon the further grounds that he was presently supporting his widowed mother.

Section 1622.30(a) provides for a deferment for a registrant who prior to August 25, 1953 has submitted satisfactory evidence to the Local Board that he has a child or children with whom he maintains a bona fide family relationship in their home. Appellant contends that Section 1622.30(a) is discriminatory in that by specifying a "cutoff" date, some fathers are deferred while others are liable for induction (Brief of Appellant, pp. 15-16). This is certainly the effect of the section. But similar results flow from all legislation and regulation, for the entire process of legislation and regulation is one of drawing the line and designating the demarcation point.

Section 456(h) of the Act authorizes the President, under such rules and regulations as he may prescribe, to provide for the deferment from training and service "any or all categories of persons who have children, or wives

and children with whom they maintain a bona fide family relationship in their homes." Under the provisions of the Act, the regulations could have been drawn so that all registrants no matter how numerous their children would not be entitled to a deferment. The President chose instead to allow deferments to registrants with children on August 25, 1953, but to none others unless the existence of a child and the induction of a registrant would result in extreme hardship. The establishment of this deadline was assuredly within the authority granted the President.

This Court's comments in the case of *Talcott v. Reed* (9th Cir., 1954), 217 F. 2d 360, cited by appellant at page 15 of his brief, were not directed at Section 1622.30 but were directed at General Hershey's Operation Bulletin No. 57. That Bulletin is not pertinent to the issues raised here and this Court's comments would seem to have no application.

If the registrant was not entitled to be reclassified because of his dependents then his only other claim to a III-A classification would have been upon the basis that to perform civilian work of national importance would have caused his dependents extreme hardship.

It must be recalled that the hardship caused the dependents of one who is inducted into the armed forces will always be far greater than that imposed upon a registrant ordered to perform civilian work. In many cases the conscientious objector performing civilian work of national importance can earn a salary equal to that which he previously earned, although he might be required to work longer hours and perhaps work at two different jobs. Furthermore the I-W registrant's dependents are not deprived of his presence while he is serving his country. For this reason even if it were the policy of the Local

Boards to grant deferments for hardship to conscientious objectors, they would be justified in withholding such deferment except in the event of extraordinary circumstances.

Whether or not the Local Board shall reopen a case is left entirely to their discretion by the Act and the regulations. The Board considered the assertions of the registrant and decided not to reopen. It appears that reopening in this instance would have been a futile, time consuming, action, for the registrant would not have been entitled to the classification requested by him under any circumstances. This Court in the case of *Talcott v. Reed*, *supra*, at page 363 stated as follows:

“As to hardship, we think the showing is not sufficient to require a reversal. A showing of hardship in some degree could be made as to every selectee. Army life removes the young man from regular pursuits. We think in a very extreme case only would a court be justified in reversing a board’s order on this point.”

D. The Registrant Was Not Entitled to an Appeal From the Local Board’s Decision Not to Reopen His Case.

On April 16, 1954, after reviewing the facts set forth in the registrant’s letter requesting to be placed in Class III-A, the Local Board notified the registrant the facts presented by him did not warrant reopening [Ex. p. 101]. The Local Board acted correctly in sending notice of their decision by letter rather than by Form No. 110. (Regulations, Sec. 1625.4.) The registrant had no right to appeal from this decision. (Sec. 1626.2(c); *Skinner v. United States* (9th Cir., 1954), 215 F. 2d 767.) Nor did he have the right to a personal appearance before the Local Board. (Sec. 1624.1, 1624.2.)

Section 460(b)(3) of the Universal Military Training and Service Act provides for the establishment within the Selective Service System of civilian appeal boards and also states:

“. . . The decisions of such local board shall be final, except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe.”

Congress, therefore, intended that the President should regulate review procedure and he, in turn, has done so. There is little doubt that had Congress desired they could have provided that the decision of the Local Board would be final. The fact that the regulations do not provide for administrative review from a decision of the Local Board refusing to reopen a case is simply not a constitutional question. What Congress could abolish completely they can regulate as they see fit.

Were the regulations to provide for review from a decision refusing to reopen, the administrative procedure would be nonending. As soon as one appeal was determined another could be begun to the complete frustration of the congressional purpose. The case before this Court presents a very good example of this possibility. The registrant was classified I-O on November 18, 1953. According to his assertion contained in his letter of June 15, 1954, he had been supporting his mother since December 10, 1952. And yet this fact was not brought to the attention of the Local Board until April 14, 1954, at which time the registrant requested reopening in part upon the basis of this “new evidence.” Had the regulations provided for appeal from the Board’s decision not to reopen, and the registrant had done so, it is predictable that after

the Appeal Board had affirmed, the registrant would have presented other “new evidence” to the Local Board thus beginning this dilatory process anew.

Furthermore, it is doubtful that the registrant intended to appeal in the technical sense when he wrote his letters of April 14, 1954 and June 15, 1954. Rather he used the term “appeal” in the sense of the term “request.” This must be so in the instance of the April 14, 1954, letter since there was nothing from which to appeal from. He was last classified on November 18, 1953, and the time for appeal had long since expired. On April 14, 1954, the registrant said:

“Although I am still full a Conscientious Religious Objector of the Molokan Faith, there have come about certain events under which *I am appealing* for a 3-A classification. . . .

“Awaiting your decision on my *Appeal* for a 3-A classification . . .” (Emphasis added.)

In his letter of June 15, 1954, the registrant began by stating:

“*I am appealing* to you members of *Local Board No 114* in request for a cancellation of the report for civilian work that you have sent to me . . .” (Emphasis added.)

The letter continues with a statement of the background of the registrant’s classification and then concludes:

“I believe that I am justified in asking for a reconsideration of this *new evidence* which had not been presented until last April 14, 1953³ and in asking for a 3-A classification.”

³Registrant intended to state April 14, 1954 rather than April 14, 1953 [See Tr. pp. 24, 25].

The context in which the terms “appeals” and “appealing” were used by the registrant makes it apparent that he intended no appeal. The letters were so construed by the District Court who heard the case at trial [Tr. pp. 47, 48]. In the case of *Jeffries v. United States* (10th Cir., 1948), the registrant wrote to the local board stating, “I hereby appeal to the local board for reconsideration of my Selective Service classification . . .” There it was held that the language was not intended as an appeal even though the time for appeal from the registrant’s classification had not expired.

The regulations provide for a liberal construction of notices of appeal from registrants (Sec. 1626.1). But, there should be no magic words in this field of law any more than in any other. The District Court weighed the evidence and found that the registrant did not intend to appeal. That should conclude the subject.

II.

Section 456(j) of the Universal Military Training and Service Act Is Constitutional.

Appellant contends that Section 456(j) of the Universal Military Training and Service Act of 1948 is unconstitutional for the following reasons:

1. It constitutes a non-federal labor draft in violation of the XIII and XIV Amendments of the Federal Constitution.
2. To require appellant to enter civilian employment not of his own choosing in lieu of military service is an unconstitutional trespass upon appellant’s religious liberty.

Under the Selective Training and Service Act of 1940 conscientious objectors were assigned to civilian public

service camps administered by the Federal Government. The Courts reviewing this Act consistently upheld its constitutionality. They held that the Act was not faulty in failing to specify the standards to be used in determining what work was of "national importance."

Atherton v. United States (9th Cir., 1949), 176 F. 2d 835, 841;

Weightman v. United States (1st Cir., 1944), 142 F. 2d 188.

It was held that those conscripted were not being deprived of liberty and property without due process of law by the fact that they worked at a rate of compensation below what they otherwise could have earned.

Atherton v. United States, supra, p. 841;

Hopper v. United States (9th Cir., 1943), 142 F. 2d 181, 186.

These Courts failed to sustain the contention that the Constitution provides only for raising an army and does not permit drafting for other purposes. It was held instead that Congress had the right to call everyone to colors and that no one is exempt except through Congressional allowance.

Roodenko v. United States (10th Cir., 1945), 147 F. 2d 752;

Weightman v. United States, supra;

Atherton v. United States, supra.

Similarly, the contention was rejected that the Act of 1940 violated the right of the individual to freedom of worship and belief. The Courts held that the Constitution grants no immunity from Military Service because of religious convictions or activities. Immunity arises solely

through Congressional grace in pursuance of a traditional American policy of deferment to conscientious objection.

Richter v. United States (9th Cir., 1950), 181 F. 2d 591, 593;

Roodenko v. United States, supra.

The Courts' unanimous reply to contentions that the Act of 1940 was unconstitutional may best be summarized by the following statement from *Roodenko* at page 754:

"If Congress . . . has the power to compel conscientious objectors to serve in the military forces, they cannot be heard to complain that they are relieved from such service on condition that they nevertheless recognize their obligation of citizenship and respond to call and serve their country on non-military work of national importance, under civilian authority. Congress could have required Roodenko to serve in the armed forces. Having no constitutional right of exemption from such service, he certainly can have no constitutional grounds to challenge the validity of an Act which gives him a conditional exemption for a service which he could be compelled to perform."

Under the Act of 1948 the conscientious objectors retain their personal freedom of movement but are required to perform civilian work contributing to the maintenance of the national health, safety or interest. Their lot is much brighter than the lot of objectors under the former Act and their claims of deprivation of constitutional rights and freedoms are proportionately less grave. The Courts have had opportunity to review the validity of Section 456(j) of the Universal Military Training and Service Act. As late as March 16, 1955, this Court in the case of *Niles v. United States* (9th Cir., 1955), 220 F. 2d 278, passed upon a case simliar to the one at hand, and affirmed

the decision of the District Court for the reasons stated in the Opinion of that Court to be found in 122 Fed. Supp. 383. There it was also contended that the Act as applied by the regulations calls for a private non-federal labor draft in violation of the Thirteenth Amendment. The District Court answered this contention by stating at page 384:

“The 13th Amendment abolished slavery and involuntary servitude, except as a punishment for crime, but was never intended to limit the war powers of government or its right to exact by law public service from all to meet the public need.”

The *Niles* Decision, *supra*, also resolves the contention of appellant that the work which he was ordered to perform did not contribute to the maintenance of the “national health, safety, or interest” as required by Section 456(j) of the Act. There, as here, Niles was ordered to report to the Los Angeles Department of Charities. The Court stated at pages 384 and 385:

“A health program conducted by any political subdivision of this nation contributes to the general welfare of the national as a whole. The mere fact that such activities are carried out in the name of a political subdivision of the state or county rather than in the name of the United States itself, does not diminish the importance of the work, or cause it to lose its contributory relationship to the national health.

* * * * *

“In view of the fact that this Court has construed employment in a state charitable institution as work contributing to the maintenance of the national health, safety, or interest, any work done by defendant for such institution within the scope of its operation, is proper and in accordance with the standard set forth by Congress.”

Conclusion.

This appeal involves a registrant to whom the Local Board gave the classification requested by him. Still, he refused to fulfill the obligation required of him by the Universal Military Training and Service Act.

The Judgment of Conviction should be affirmed.

Respectfully submitted,

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No. 14628
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

NICK ALLEN KLUBNIKIN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division, The Honorable James M. Carter, Presiding.

APPELLANT'S REPLY BRIEF.

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No. 14628

IN THE

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NICK ALLEN KLUBNIKIN,

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Appellee.

APPELLANT'S REPLY BRIEF.

I.

The Registrant Was Entitled to Reclassification Notwithstanding His Status as a Conscientious Objector.

The main thrust of appellee's rebuttal stems, it seems, from its construction of section 1622.30(b) of the Selective Service Regulation (hereinafter referred to as the Regulations, and sometimes as SSR) which provides as follows:

“(b) In Class III-A shall be placed any registrant whose induction *into the armed forces* would result in extreme hardship and privation (1) to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support, or (2) to a person under 18 years of age

or a person of any age who is physically or mentally handicapped whose support the registrant has assumed in good faith; provided, that a person shall be considered to be a dependent of a registrant under this paragraph only when such person is either a citizen of the United States or lives in the United States, its Territories, or possessions.” (Italics added.)

In effect, it is the government’s position that a registrant is ineligible for a III-A classification unless there is what might be termed a “clear and present danger” of his induction into military service (Appellee’s Br. pp. 8-10). Since the appellant was classified as a conscientious objector (I-O), so it is argued, his exemption from military service is assured, and, therefore, the kind of hardship envisioned by Congress and the President could not possibly flow to him because the civilian duties to which he was assigned would keep him at home, and in good salary (Appellee’s Br. p. 9).

The weakness of this reasoning is signified by the absence of any supporting authority in the appellee’s brief. Moreover, it ignores Section 1623.2 of the Regulations which provides that:

“Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, *the registrant shall be classified in the lowest class* for which he is determined to be eligible, with Class I-A-O considered the highest class and Class I-C considered the lowest class according to the following table:

Class: I-A-O

I-O

I-S

II-A

II-C

II-S

I-D

III-A

Class: IV-A

IV-B

IV-C

IV-D

IV-F

V-A

I-W

I-C"

(Italics added);

and overlooks, too, the complete absence of any regulation or law which precludes successive, and even inconsistent deferment claims (*United States v. Peebles* (7 Cir.), 220 F. 2d 114, 118).

The President has not excepted conscientious objectors from making application for a different type of deferment. On the contrary, the President has provided that *every* registrant who can establish eligibility for a lower classification *must* be placed therein (SSR 1623.2). Appellant's classification at the time of his conviction was I-O,¹ a higher classification than the III-A which he requested. Plainly, therefore, unless the regulations expressly provide to the contrary, which they do not, the appellant is entitled as of right to a consideration of his claim to III-A classification, regardless of his present status as a conscientious objector.

¹The government in its brief (p. 9) obliquely refers to I-W registrants (conscientious objectors performing civilian work); but while this classification is lower than III-A, appellant was ineligible therefor because he had not qualified under the applicable regulation, SSR 1622.16, which requires that the registrant:

" . . . has entered upon and is performing civilian work contributing to the maintenance of the national health, safety, or interest, in accordance with the order of the local board"

Nor had the local board released him from such civilian duty.

The government, in advancing the contrary contention, places undue emphasis on that portion of section 1622,30 (b) of the Regulations which reads:

“. . . whose induction *into the armed forces* would result in extreme hardship”

Appellee construes that language to mean *actual* or *imminent* induction. But such an interpretation is completely unwarranted, and the government has failed to support this view with either legislative history, or judicial precedent. If the President had so intended, as is claimed, those words could and should have been expressly supplied in the Regulation, rather than left to dangle as an afterthought from inference and speculation.

We agree with the appellee that the wording of section 1622.30(b) probably suggests that the degree of hardship upon the registrant's family is to be tested by the impact upon them of his service in the armed forces. But it does not follow at all that the registrant must be in imminent peril of induction, or even that his induction be plausible, in order to qualify for a III-A classification.

III-A is but one of sixteen classifications into which a qualified registrant may be placed for deferment. I-O is another such classification. In each case, of course, the alternative to deferment is military service. No classification is permanent, however (SSR 1625.1), and, therefore, a deferred registrant may be reclassified into military service at any time. It is against common sense to argue that a deferred registrant must await his reclassification into I-A before claiming III-A. Indeed, in so doing the registrant not only violates SSR 1625.1(b),

requiring registrants to notify the local boards of a change of status, but additionally, the registrant lays himself open to the charge of insincerity.

In sum, therefore, section 1622.30(b) provides that “any registrant” shall be placed in III-A who demonstrates eligibility therefor, and he is entitled to the lowest classification for which he establishes qualification (SSR 1623.2). Every registrant is entitled to claim successive deferments on different grounds (*United States v. Peebles* (7 Cir.), 220 F. 2d 114; *United States ex rel. Hull v. Sulter* (7 Cir.), 151 F. 2d 633; *Taffs v. United States* (8 Cir.), 208 F. 2d 329). There is no regulatory or statutory provision disqualifying conscientious objectors from claiming or receiving exemptions for hardship. Hence, if appellant can establish his eligibility for such a classification, he is entitled to be placed in that category.

II.

The Appellant Was Deprived of Due Process of Law by the Failure of the Regulations to Permit Appeal From the Local Board’s Refusal to Reopen His Classification.

The government next argues that a registrant is not entitled to appeal from the decision of a local board not to reopen his classification because if such a right were to exist, there would be no end to administrative procedures (Appellee’s Br. pp. 14-15).

This point was fully covered by appellant in his opening brief (pp. 6-11) so that the discussion here may be confined to a few words of emphasis.

The blunt fact is that this contention of the government does not answer the imperative and constitutional need for fair administrative procedures so obviously lacking in this case. What appellee is saying is that regardless of the merits of a deferment claim, the local board may slam the door upon the further pursuit by a registrant of his rights. Correlatively, this argument also opens much wider the door of the courts to whom the registrant must then look for redress.

If a registrant is entitled to make successive claims to deferment on different grounds (*United States v. Peebles, supra*), and is entitled to a fair consideration of those claims (*United States v. Peebles, supra*; *United States v. Greene*, 220 F. 2d 793; *United States v. Brown*, 129 Fed. Supp. 237), then it follows that he has a minimal right to be heard in behalf of that claim (*Talcott v. Reed*, 217 F. 2d 360, 362; *United States v. Greene*, 220 F. 2d 793), and to have that claim passed upon by a higher administrative tribunal (*Mintz v. Howlett* (2 Cir.), 207 F. 2d 738, 762; *United States v. Fry* (2 Cir.), 203 F. 2d 638, 640; *United States v. Stiles* (3 Cir.), 169 F. 2d 455, 459; *Davis v. United States* (6 Cir.), 199 F. 2d 689, 691; *Knox v. United States* (9 Cir.), 200 F. 2d 398, 401-402; *United States v. Peebles*, 220 F. 2d 114, 120).²

²For reasons given, we do not here pause to reargue the question of whether appellant's letters constituted an appeal.

III.

The Local Board's Refusal to Reopen Appellant's Classification Was Arbitrary and Capricious.

A.

The Scope of the Board's Discretion Generally.

Whether or not the local board has an absolute discretion in disposing of requests for reopening a classification is a matter of considerable doubt. Certainly it is clear that there are some severe limitations on the exercise of that power imposed by both the Regulations and by the Courts. For example, section 1622.30(b) of the Regulations makes compulsory the classification of a registrant into III-A where he establishes eligibility therefore. Section 1623.2 of the Regulations provides that a registrant is entitled as a matter of right to the lowest classification for which he is eligible. Furthermore, when there comes to the attention of the board information indicating a registrant's eligibility for a different classification, it is bound to reclassify the registrant, or at least give him notice of the action contemplated (SSR 1625). Additionally, the latter Regulation requires each registrant to notify the local board of a change of status, presumably to permit the board to correctly classify the registrant in accordance with his then present status.

Thus, the discretion of the Board in reopening classifications cannot be as broad as is suggested by the government, for if a registrant is to be properly and correctly classified, and if the registrant is entitled as of right to the lowest classification for which he is eligible, then

the Board is under an obligation to reopen a classification, under the foregoing conditions, if only to ascertain the merits of the claim.

The one judicial decision cited by appellee, as advocating the opposite rule, *Skinner v. United States* (9 Cir.), 215 F. 2d 767, did not involve the right to appeal a classification, but only whether it was necessary to do so.

In any event, it cannot be gainsaid that the board has a continuing duty to hear the merits of a claim (at least one not patently frivolous) (*Talcott v. Reed*, 217 F. 2d 360, 364), and to properly classify each registrant according to the status which he has established, irrespective of formal regulatory procedures. These are not adversary proceedings, and the technical niceties of law have no place in them. Rather the emphasis should be toward the fair administration of the Selective Service program, and its application to all registrants in equal proportion in accordance with common sense and justice. The Court of Appeals for the Seventh Circuit expressed this view quite simply, but effectively, in *United States v. Greene*, 220 U. S. 792 at p. 793:

“Selective Service System means just that. It is the sifting and testing process by which individual eligibility, exemption and deferment are determined with Congressional blueprints and enunciated legislative policy. While classification is the democratic method for obtaining military man-power *it is not an adversary proceeding* between Board and registrant in which the slightest mis-step mechanically penalizes registrants.

“In these times men everywhere closely watch how this Nation administers its laws and follows announced principles. The vitality of tolerance lies in substance and results, not in mere lip service.” (Italics added.)

B.

The Board Abused Its Discretion in This Case by Refusing to Reopen the Appellant's Classification.

Assuming *arguendo*, that it is discretionary with the board as to whether a classification warrants reopening, nonetheless the local board abused its discretion in this case.

It is well established by now that the decision of a local board will be set aside by the courts if it is arbitrary or unreasonable (*Dickinson v. United States*, 346 U. S. 389; *Cox v. United States*, 332 U. S. 442; *Simmons v. United States*, 75 S. Ct. 397; *Sicurella v. United States*, 75 S. Ct. 403; *Talcott v. Reed* (9 Cir.), 217 F. 2d 360, 363; *Moon v. United States*, 220 F. 2d 730; *United States v. Peebles*, 220 F. 2d 117; *United States v. Brown*, 129 Fed. Supp. 237.) This court's decision in *Talcott v. Reed*, relied upon by the government for a contrary proposition, implicitly recognizes in its holding (that hardship had not been sufficiently demonstrated by the registrant (p. 363)), that an arbitrary refusal of a local board to reopen will not be left unmolested by the court.

The abuse of its discretion by the board here was two-fold: First, and primarily, in refusing to reopen appellant's classification, even though it might subsequently decide that appellant's claim did not constitute adequate grounds for reclassification into III-A; and second, in the failure of the board to reclassify registrant into III-A. A decision favorable to the appellant on the first ground obviates the necessity of reaching the second, and necessarily leaves to the board consideration of the merits of appellant's claim in its discretion. We leave to the opening brief, and to oral argument, the merits of this claim, and pass, therefore, to the first ground only.

It is quite apparent that the board gave short shift to appellant's claim to III-A classification, having replied to them in an haste which belies fair evaluation of registrant's letters³ (Compare: *United States v. Peebles*, 220 F. 2d 114).

Of possibly greater significance, however, is the intimation in appellee's brief (at pp. 12-13) that it was against board policy to grant a III-A classification to I-O registrants (conscientious objectors). If this is in fact board policy, then obviously the board did not even consider the merits of appellant's request for III-A classification, and hence, it deprived him of due process of law (*Talcott v. Reed*, 117 F. 2d 360, 364; *United States v. Peebles*, 220 F. 2d 117; *United States v. Brown*, 129 Fed. Supp. 237).

The analogy to *Talcott v. Reed*, and *United States v. Brown*, is plain. In *Talcott*, this court held as error, *inter alia*, the board's failure to afford the registrant an opportunity to appear personally in behalf of his claim. Similarly, the appellant here has not been accorded the opportunity to establish his claim of hardship; has not been able to gain a fair appraisal of the claim.

In *Brown*, the local board had refused to reopen a registrant's I-A classification so as to permit him to file a claim of conscientious objection to war, apparently on the theory that the claim came too late. The court entered a judgment of acquittal, stating (at p. 238):

"It is evident that the board did one of two things—either it failed to consider the applicant's request for change of classification to that of conscientious objector, or it failed to find sufficient reason therein to warrant such change! If the first be the fact,

³See: Opening brief, p. 12; SSF—101; 119.

then the board acted arbitrarily and deprived the registrant of a right. If the second alternative was the one pursued, *then the board acted arbitrarily in not reopening and considering the alleged change of status, since there is nothing in the record to offset the statement alleged in the application for reclassification as a conscientious objector. Dickinson v. U. S., 346 U. S. 389, 74 S. Ct. 152, 98 L. Ed. 64.*" (Italics added.)

Manifestly, there is nothing in the evidence here which refutes the truth of the registrant's claim to a III-A status, although the facts submitted by appellant were susceptible of objective appraisal. There is no evidence upon which the board could predicate its refusal to reopen appellant's classification, unless the board deemed the claim tardy, and, therefore, unbelievable.⁴ If this is the basis for the board's decision, then its decision is again invalid, for, as we pointed out in our opening brief (pp. 17-19), the sincerity of a claim for deferment does not depend upon the timeliness of its presentation (*United States v. Peebles* (7th Cir.), 220 F. 2d 114; *Moon v. United States* (5th Cir.), 220 F. 2d 730; *United States v. Brown, supra*).

In the *Peebles* case, the registrant applied for deferment as a conscientious objector, but only after he had exhausted all other available classifications, and after he had satisfactorily passed his physical examination preparatory to his induction. The board rejected his claim for I-O as insincere, but the Court of Appeals for the Seventh Circuit reversed, holding that the board was required to give fair and impartial consideration to the registrant's claim regardless of when made.

⁴A view apparently held, at least, by the District Court below. [See T. R. 25, 35, 44.]

In *Moon v. United States*, a conviction based upon the board's refusal to entertain a claim of conscientious objection was set aside by the court, notwithstanding the belated claim thereto, plus the failure of the registrant to appear at an interview to determine the sincerity and nature of his claim.

Here, not only was the appellant unable to appeal the Board's decision, but he was not even afforded the opportunity to appear personally in behalf of his claim, or to secure a fair consideration of that claim.

It is respectfully submitted, therefore, that the refusal of the local board to reopen appellant's classification rests either upon erroneous grounds, or upon no grounds at all, and is therefore an invalid and improper decision which cannot lawfully support appellant's conviction.

The other arguments advanced by appellee appear to have been amply covered in our opening brief, and it would only be repetitious to reply to them here. Therefore, we leave these matters to oral argument, but with the admonishment that the absence of further rebuttal should not be construed as an acknowledgment or concession of the validity of the other of the government's contentions.

Conclusion.

The judgment of conviction entered by the court below should be reversed and set aside.

Respectfully submitted,

A. L. WIRIN,

HUGH R. MANES,

Attorneys for Defendant-Appellant.

No. 14631

**United States
Court of Appeals**
for the Ninth Circuit

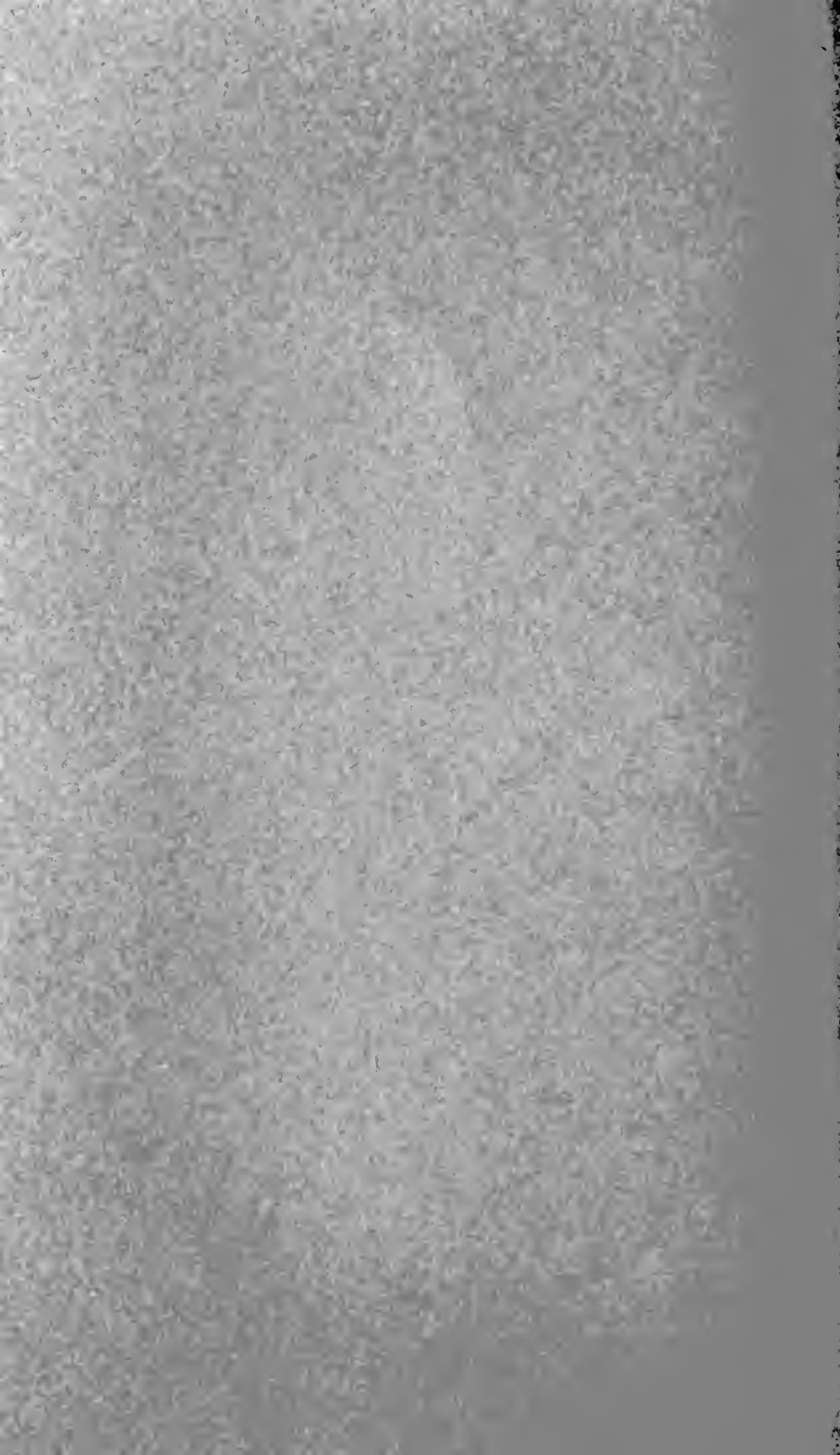
In the Matter of
HARRY SMITH MACHINE COMPANY, a Cali-
fornia Corporation,
Debtor.
**SAMUEL A. MILLER and MASON & WAL-
LACE**,
Appellants.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California
Central Division.**

FILED

MAR 21 1955



No. 14631

United States
Court of Appeals
for the Ninth Circuit

In the Matter of

HARRY SMITH MACHINE COMPANY, a California Corporation,

Debtor.

SAMUEL A. MILLER and **MASON & WALLACE**,

Appellants.

Transcript of Record

**Appeal from the United States District Court for the
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

SAMUEL A. MILLER,
MASON & WALLACE,
700 Lane Mtge. Bldg.,
Los Angeles 14, Calif.



In the District Court of the United States, Southern
District of California, Central Division

No. 60220-C

In the Matter of

HARRY SMITH MACHINE COMPANY, a Cali-
fornia Corporation,

Debtor.

PETITION OF DEBTOR FOR APPOINTMENT
OF ATTORNEYS

To the Honorable District Court of the United
States, for the Southern District of California,
and to the Honorable David B. Head. Referee
Herein:

The petition of Harry Smith Machine Company,
a corporation, by and through Harry Smith, its
President, respectfully shows:

I.

That your petitioner is the debtor in possession,
having filed a proceeding in the above-entitled Court
under Chapter XI of the Bankruptcy Act, which
petition is now pending in this Court.

II.

That said petition and all of the moving papers
in connection therewith, including schedules, state-
ments of affairs, petitions and orders thus far pre-
sented and entered in this matter or to be prepared
and entered in this matter were prepared or will
be prepared by your petitioner's attorneys, Samuel
A. Miller and Messrs. Mason & Wallace.

III.

That in the course of these proceedings it will be necessary for your petitioner to have counsel for the purpose of representing it in all steps of this proceeding. That your petitioner is desirous of employing Samuel A. Miller and Messrs. Mason & Wallace, attorneys duly admitted to practice in the above-entitled Court (that Samuel A. Miller of said firm of attorneys specializes in bankruptcy matters), to perform all necessary legal services for it in this matter, and that your petitioner is advised and believes and therefore alleges that it is for the best interest of its estate as debtor in possession to have said Samuel A. Miller and Messrs. Mason & Wallace retained under a general retainer as attorneys herein.

IV.

That your petitioner is advised and believes and therefore alleges that said attorneys represent no interest adverse to the estate in the matters upon which they are to be engaged and that their employment will be to the best interests of the estate.

Wherefore, your petitioner prays that an order be made and entered appointing said Samuel A. Miller and Messrs. Mason & Wallace as attorneys for the debtor in these proceedings.

**HARRY SMITH MACHINE
COMPANY,**

A Corporation,

By /s/ HARRY A. SMITH,
President.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed March 23, 1954, Referee.

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Cause.]

ORDER APPOINTING ATTORNEYS
FOR DEBTOR IN POSSESSION

Upon reading and filing the verified petition of Harry Smith Machine Company, a corporation, and it appearing therefrom that it will be to the best interest of the estate to employ Samuel A. Miller and Messrs. Mason & Wallace upon a general retainer as attorneys for the Debtor in possession, and good cause therefor appearing, now, therefore—

It Is Hereby Ordered, Adjudged and Decreed that Samuel A. Miller & Messrs. Mason & Wallace be, and they are hereby appointed attorneys, for the debtor in possession in the above-entitled matter under a general retainer, and that they shall be compensated for their services out of the estate of the debtor.

Dated: March 23, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed March 23, 1954, Referee.

[Endorsed]: Filed January 13, 1955.

[Title of District Court and Cause.]

PETITION FOR ARRANGEMENT UNDER
SECTION 322

To the Honorable Judges of the District Court of
the United States, for the Southern District of
California, Central Division:

The petition of Harry Smith Machine Company,
a California corporation, of 5300 West Century
Boulevard, in the City of Los Angeles, County of
Los Angeles, State of California, and engaged in
the operation of an automatic screw machine busi-
ness, respectfully represents as follows:

I.

Your petitioner has had its principal place of
business at 5300 West Century Boulevard, City of
Los Angeles, County of Los Angeles, State of Cali-
fornia, within the above Judicial District, for a
longer portion of the six (6) months immediately
preceding the filing of this petition than in any
other Judicial District.

II.

No bankruptcy proceeding initiated by a petition
by or against your petitioner is now pending.

III.

Your petitioner is unable to pay its debts as they
mature and proposes the following arrangement
with its creditors:

A. The debts of your petitioner to be affected
by this plan of arrangement shall be as follows:

1. All debts which have priority under Section 64a (1), (2) and (4) of The Bankruptcy Act.

2. All debts which are unsecured, including the claims, if any, arising from the rejection of executory contracts.

B. The debts of your petitioner as above set forth shall in this plan of arrangement be treated as follows:

1. All debts included in Class A (1) are to be paid in cash in full upon the signing of the Order of Confirmation of the plan, or to be paid at such time and in such installments as may be agreed upon by and between your petitioner and the various Taxing Agencies having claims coming within this class of indebtedness.

2. All debts included in Class A (2) shall be paid as follows:

(a) Sixty (60%) per cent of the amount due unsecured creditors as scheduled or as proved and allowed by the Court, when paid as hereinafter designated, shall be accepted by the unsecured creditors as full payment of their indebtedness and shall constitute full payment of the indebtedness of unsecured creditors. Said sixty (60%) per cent to be paid as follows:

(b) Five (5%) per cent of the amount due to general unsecured creditors to be paid in cash ninety (90) days after the signing of the Order of Confirmation of the plan, and a like five (5%) per cent each and every thirty (30) days after the first pay-

ment of five (5%) per cent until the general unsecured creditors shall have been paid a total of sixty (60%) per cent of the amount of their claims as scheduled or as approved and allowed by the Court. Deferred payments to be without interest unless there is a default in payment on the due date, in which event the faulted installments only shall bear interest at the rate of five (5%) per cent per annum, and shall be evidenced by a note to be dated as of the date of the signing of the Order of Confirmation.

IV.

The funds to pay the various payments herein provided for are intended to be raised by the debtor from a more efficient and more successful operation of its business and come out of income, and to this end it is proposed that the debtor shall continue the operation of its business from the date of the filing of this proceeding until the terms of the plan are accepted by the creditors as required by law and confirmed by the Court.

V.

Any and all debts incurred after the filing of the original petition under Section 322 of Chapter XI of The Bankruptcy Act and prior to the confirmation of the plan of arrangement shall be paid in cash in full upon confirmation, except that the time of payment of all or any part of such debts may be extended by agreement with the creditors to whom such debts are due, and such extended debts shall, when due, have priority payment over the debts to be affected by this arrangement.

VI.

The debtor shall have the right and reserves the right to appear and contest any and all claims filed in this proceeding.

VII.

The debtor likewise reserves the right to hereafter file a schedule of the executory contracts which it may desire to reject if it is so advised.

VIII.

Upon confirmation and performance of the terms of this petition your petitioner shall be discharged from all liabilities or claims affected by this plan.

IX.

The Court shall retain jurisdiction until the deposit and distribution of the note and funds herein provided for and the hearing and disposition of any claims that may be objected to.

X.

The schedules hereto annexed marked Exhibit "A," verified by your petitioner's oath, contain a full and true statement of all of its debts insofar as it is possible to ascertain, including the names and places of residence or business of its creditors, and such further statements concerning said debts as are required by the provisions of the Acts of Congress relating to Bankruptcy.

XI.

The schedules hereto annexed marked Exhibit "B," verified by your petitioner's oath, contain an

accurate inventory of all of its property as nearly as it is able to ascertain the same, both real and personal, and such further statements concerning said property as are required by the provisions of said Act.

XII.

That there is not annexed hereto at this time a statement of executory contracts as required by the provisions of said Act, but your petitioner reserves the right to submit such statement concerning executory contracts if it be so advised.

XIII.

The statement hereto annexed marked Exhibit "C," verified by your petitioner's oath, contains a full and true statement of its affairs as required by the provisions of said Act.

Wherefore, your petitioner prays that proceedings may be had upon this petition in accordance with the appropriate provisions of Chapter XI of "The Bankruptcy Act."

HARRY SMITH MACHINE
COMPANY,

A California Corporation;

By /s/ HARRY A. SMITH,
Petitioner.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Petitioner.

Duly verified.

Summary of Debts and Assets

(From the Statements of the Debtor in
Schedules A and B)

Schedule A 1-a—Wages	none
Schedule A 1-b (1)—Taxes due United States	\$ 3,600.16
Schedule A 1-b (2)—Taxes due States ...	904.05
Schedule A 1-b (3)—Taxes due counties, districts and municipalities	1,563.27
Schedule A 1-c (1)—Debts due any person, including the United States, having priority by laws of the United States	2,305.56
Schedule A 1-c (2)—Rent having priority	1,750.00
Schedule A 2—Secured claims	17,653.14
Schedule A 3—Unsecured claims	37,509.06
Schedule A 4—Notes and bills which ought to be paid by other parties thereto	none
Schedule A 5—Accommodation paper ...	none
<hr/>	
Schedule A, total	\$65,285.24
<hr/> <hr/>	
Schedule B 1—Real estate	none
Schedule B 2-a—Cash on hand	\$ 72.66
Schedule B 2-b—Negotiable and non-negotiable instruments and securities	none
Schedule B 2-c—Stocks in trade	3,609.86
Schedule B 2-d—Household goods, furniture & fixtures	3,444.50
Schedule B 2-e—Books, prints and pictures	none
Schedule B 2-f—Horses, cows and other animals	none

Schedule B 2-g—Automobiles and other vehicles	2,879.59
Schedule B 2-h—Farming stock and implements	none
Schedule B 2-i—Shipping and shares in vessels	none
Schedule B 2-j—Machinery, fixtures and tools	120,475.14
Schedule B 2-k—Patents, copyrights, trade-marks	none
Schedule B 2-l—Other personal property.	none
Schedule B 3-a—Debts due on open accounts	4,044.46
Schedule B 3-b—Policies of insurance ...	none
Schedule B 3-c—Unliquidated claims	none
Schedule B 3-d—Deposits of money in banks and elsewhere	none
Schedule B 4—Property in reversion, remainder, expectancy or trust	none
Schedule B 5—Property claimed as exempt	none
Schedule B 6—Books, deeds and papers .	none
<hr/>	
Schedule B, total	<u>\$134,526.21</u>

HARRY SMITH COMPANY,
A California Corporation;

By /s/ HARRY A. SMITH,
President,
Petitioner.

HARRY SMITH MACHINE
COMPANY,

A California Corporation;

By /s/ HARRY A. SMITH,

President,

Bankrupt or Debtor.

SAMUEL A. MILLER,

MASON & WALLACE,

By /s/ SAMUEL A. MILLER,

Attorney for Petitioner.

Oath to Statement of Affairs

State of California,

County of Los Angeles—ss.

I, Harry Smith, President, the person who subscribed to the foregoing statement of affairs, do hereby make solemn oath that the answers therein contained are true and complete to the best of my knowledge, information, and belief.

/s/ HARRY A. SMITH,

President,

Bankrupt or Debtor.

Subscribed and sworn to before me this 25th day of March, 1954.

[Seal] /s/ RUTH KLEIN,

Notary Public.

[Endorsed]: Filed March 26, 1954, Referee.

[Endorsed]: Filed April 1, 1954.

[Title of District Court and Cause.]

AMENDMENT TO PETITION FOR
ARRANGEMENT UNDER SECTION 322

To the Honorable Judges of the District Court of the United States, for the Southern District of California, Central Division, and to the Honorable David B. Head, Referee Before Whom Said Above-Entitled Matter Is Pending:

The Debtor herein does hereby amend its petition for arrangement heretofore filed on March 26th, 1954, in the following particulars:

In addition to the payment of sixty (60%) per cent of the amount due unsecured creditors included in Class A (2) as presently set forth, the Debtor further agrees to pay the balance of forty (40%) per cent after the payment of sixty (60%) per cent, so that all general unsecured creditors shall ultimately be paid 100c on the dollar, said additional forty (40%) per cent to be paid as follows:

Thirty (30) days after the completion of the payment of sixty (60%) per cent in the manner presently set forth in the original plan on file herein the debtor shall pay five (5%) per cent of the remaining forty (40%) per cent and each and every thirty (30) days thereafter pay a like amount of five (5%) per cent of the remaining forty (40%) per cent until all general unsecured creditors have been paid in full. Said remaining forty (40%) per cent shall be evidenced by a note to be dated as of the date of the signing of the Order of Confirma-

tion, but shall be without interest unless there is a default in payment on the due date, in which event the defaulted installments only shall bear interest at the rate of five (5%) per cent per annum.

That it appears to your petitioner that no further notice is required to be sent to the general unsecured creditors by reason of the fact that their positions are not adversely affected by this amendment.

Wherefore, your petitioner prays that proceedings may be had upon this amendment in accordance with the appropriate provisions of Chapter XI of "The Bankruptcy Act."

HARRY SMITH MACHINE
COMPANY,
A California Corporation;

By /s/ HARRY A. SMITH,
Petitioner.

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed April 13, 1954, Referee.

[Endorsed]: Filed April 15, 1954.

[Title of District Court and Cause.]

ORDER CONFIRMING ARRANGEMENT

The application of Harry Smith Machine Company, a California corporation, the above-named Debtor, for confirmation of its arrangement under Chapter XI of "The Bankruptcy Act," proposed by said Debtor in its petition filed by it on the 26th day of March, 1954, and amended on the 13th day of April, 1954, having come on regularly to be heard before me, the undersigned Referee in Bankruptcy, and it appearing that due notice having been given to all persons entitled thereto, and the attorneys for the Debtor having represented in Open Court that the proposed plan as amended has been accepted in writing by a majority in number of all creditors affected by the plan, whose claims have been proved and allowed, which number represents a majority in amount of such claims, and all parties in interest at such hearing having concurred in such representation to the Court, and no one having appeared in opposition to the confirmation of said arrangement; and

It appearing that the tax claims entitled to priority having been paid and such other deposit required by the provisions of said Chapter and said arrangement has been deposited subject to the Order of the Court; and

It further appearing and the Court being satisfied that the provisions of said Chapter have been complied with; that said Debtor has not been guilty

of any of the acts or failed to perform any of the duties which would be a bar to its discharge; that the proposal of said arrangement and its acceptance are in good faith and have not been made or procured by any means, promises or acts forbidden by "The Bankruptcy Act": it is

Ordered, that the Debtor make, execute and deliver direct to the creditors or to their attorneys where represented by attorneys, the notes for sixty (60%) per cent provided for by Section 2, subdivision b of the original plan filed March 26th, 1954, and the note for forty (40%) per cent provided for in the amendment to the plan filed April 13th, 1954, payable at the times and in the percentages therein set forth: and

It Is Further Ordered, that the Court shall retain jurisdiction for a period of eight months from the date hereof for all purposes; that the Debtor file objections to such claims as it desires to object to within twenty (20) days from the date of this Order, and that any and all applications for compensation by the attorneys for the Debtor be likewise filed within twenty (20) days from the date hereof; and

It Is Further Ordered, that the Debtor shall not further encumber its present assets until all creditors have been paid in full, or in the alternative, without first advising the creditors of its intention to further encumber its present assets. This limitation, however, not to interfere with the Debtor's right to factor its accounts receivable in the ordinary course of its business; and

It Is Further Ordered that all creditors of and all claimants against the Debtor are hereby restrained and enjoined from pursuing or attempting to pursue, or from commencing any suits or proceedings at law, or in equity against the Debtor directly, or indirectly, upon any right, claim or interest which any such creditor or claimant may have had against the Debtor at the time of the commencement of this proceeding, excepting only such debts, liabilities and claims as are expressly exempted by law from discharge; and

It Is Further Ordered that title to all of the Debtor's property be and it is hereby revested in the Debtor corporation; and

It Is Ordered that said arrangement be, and it is hereby confirmed.

Dated at Los Angeles, California, this 9th day of June, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

Approved as to Form and Contents This 18th day of May, 1954.

CRAIG, WELLER &
LAUGHARN.

By /s/ [Indistinguishable],
Attorneys for Certain
Creditors.

Received May 20, 1954.

[Endorsed]: Filed June 9, 1954, Referee.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE TO
ATTORNEYS FOR DEBTOR

To the Honorable David B. Head, Referee in Bankruptcy in the Above-Entitled Matter:

The petition of Samuel A. Miller and Mason & Wallace, attorneys at law, respectfully represent:

That they were and are at all times herein mentioned attorneys for the above-named Debtor, having been so appointed by an appropriate Order of this Court filed and made on or about the 23rd day of March, 1954. That as such attorneys they have rendered all services necessary to this Debtor in this proceeding and for which they are entitled to be reasonably compensated.

That on the 12th day of March, 1954, your petitioners prepared for the Debtor an original Petition praying for relief under Chapter XI, Section 322 of The Bankruptcy Act; also prepared appropriate resolutions of the Board of Directors authorizing the filing of such Petition; also prepared under date of March 12th, 1954, a Petition for Further Time to File Schedules and appropriate Order thereon, and also prepared the list of creditors required by the appropriate Sections of The Bankruptcy Act.

On March 15th, 1954, your petitioners prepared a "Petition by the Debtor in Possession for Authority to Operate Business and to Pay Compensation,"

and after a conference as between the President of the Debtor corporation, one of the attorneys for the Debtor and the Referee, there was signed an Order authorizing Debtor in possession to operate the business, etc., prepared by the Debtor's attorneys.

That thereafter and on or about the 26th day of March, 1954, your petitioners filed the Schedules of assets and liabilities, and thereafter and on March 26th, 1954, your petitioners prepared and filed Petition for Arrangement Under Section 322.

That thereafter your petitioners received from the office of Gitelson, Ashton, Moore & Coyle a petition on behalf of one, Harold Riel, for leave to sue the debtor corporation in the State Court and a notice thereof, upon which a hearing was held on the 21st day of April, 1954, at which petitioners were present and upon which petition the Court made an appropriate Order.

That under date of April 13th, 1954, after the hearing in Court on the original Petition for Arrangement under date of April 12th, 1954, at 2:00 p.m. your petitioners prepared and filed an Amendment to the original Petition for Arrangement and presented and filed the same in Court.

That on March 19th, 1954, your petitioners called an informal meeting of the creditors at the Credit Managers Association and presented informally the problems and the position of the Debtor requesting

the assistance and the cooperation of the creditors at said meeting and at such further meetings.

That your petitioners also prepared and sent to all creditors the form of "Acceptance by Creditors of Debtor's Plan of Arrangement."

That under date of April 14th, 1954, your petitioners prepared and filed a request for appointment and oath of appraiser by which H. A. Sheedy was appointed appraiser.

That on May 12th, 1954, your petitioners prepared and had signed an Order authorizing the Debtor to borrow money, to wit, the sum of \$4,500.00 from the Farmers & Merchants Bank of Long Beach for the purpose of making payment of the tax creditors.

That on May 18th, 1954, your petitioners caused to be copied and filed a Profit and Loss Statement prepared by the Debtor's accountant, C. B. Mulholland.

That on May 18th, 1954, your petitioners prepared and filed the "Debtor's List of Debts Paid and Extended as Required by the Court" for the purpose of determining the costs to be paid by the Debtor.

That your petitioners prepared and filed herein the Application for Confirmation of Arrangement, and under date of May 20th, 1954, filed an Order Confirming Arrangement after it appeared that the arrangement as originally filed and amended had been accepted by the majority in number and

amount of creditors. That said Order Confirming Arrangement was not actually signed until June 9th, 1954, at which time your petitioners presented to the Court for and on behalf of the Debtor the amounts to be paid to the Referee's salary fund and the Referee's expense fund and charge for special services as computed by the Clerk of the Court and in the total sum of \$502.92.

That in addition to each and all of the foregoing formal documents prepared and filed by your petitioners for and on behalf of the Debtor herein, there were numerous conferences as between your petitioners and the principals of the Debtor corporation, its employees, its accountant and its various creditors, which consumed many hours of time in discussing the problems of the Debtor and the proposed arrangement and the manner of submitting the plan to the creditors and to the Court. That in addition there were numberless telephone conversations and calls as between your petitioners and the principals of the debtor corporation, creditors, Taxing Agency representatives, attorneys for creditors and for Taxing Agencies, and others in interest, and further in addition there were letters either received by or sent to creditors, debtor and others in interest from the date of the filing of the petition to the 11th day of June, 1954, which was the date of the last letter to the District Director of Internal Revenue Service, that numbered approximately fifty (50) (some of them many pages long) letters other than mimeographed letters that went to all creditors

with forms of consent in the solicitation of the consents and the help and the cooperation of the creditors of the debtor to effect the plan and consummate the arrangement. That there are services yet to be rendered to the Debtor before the plan of arrangement will be finally carried out, which cannot as yet be anticipated.

That your petitioners have received at the time of their employment and as is reflected by the schedules on file herein, the sum of \$750.00 on account of legal services, and the further sum of \$45.00 for the filing fee of the petition herein.

That your petitioners believe that a further additional and reasonable fee to be paid to them for the services rendered herein is in the sum of \$3,500.00.

Wherefore, by reason of the foregoing and all thereof your petitioners pray that they be allowed a further additional and reasonable fee in the sum of \$3,500.00.

That your petitioners are mindful of the fact that the debtor may not have the present ability to pay such amount and are willing to accept the note of the debtor corporation to be paid in twelve equal monthly installments with interest at six per cent, and which sum, when allowed, being one of the costs and expenses of administration, shall be a lien on the assets of the debtor corporation until paid.

SAMUEL A. MILER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER.

their petition asking for an additional allowance in the amount of \$3,500 compensation for services rendered to the debtor in these proceedings.

It further appearing that notice of hearing on said petition having been sent to the creditors and other interested parties, and it further appearing that said attorneys for debtor are willing to accept the note of the debtor corporation to be paid in twelve (12) equal monthly installments, with interest at six (6) per cent in payment of any allowance made herein,

Therefore It Is Ordered That compensation of Samuel A. Miller and Mason and Wallace, attorneys at law, be fixed in the amount of \$3,500 and that the debtor execute and deliver to them the note of the debtor corporation, payable in twelve (12) equal installments, with interest at six (6) per cent for the payment thereof, and that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954.

Dated this 10th day of August, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy.

[Endorsed]: Filed August 10, 1954, Referee.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER

To the Honorable David B. Head, Referee in Bankruptcy:

The petition of Samuel A. Miller & Messrs. Mason & Wallace respectfully represents:

I.

Your petitioners are aggrieved by a portion of the Order made on the 10th day of August, 1954, a copy of which Order is annexed hereto, marked petitioners' Exhibit "A" and made a part hereof by reference.

II.

Your petitioners on June 18th, 1954, filed a Petition for Allowance to Attorneys for Debtor, which in part stated:

"That your petitioners are mindful of the fact that the debtor may not have the present ability to pay such amount and are willing to accept the note of the debtor corporation to be paid in twelve equal monthly installments with interest at six per cent, and which sum, when allowed, being one of the costs and expenses of administration, shall be a lien on the assets of the debtor corporation until paid."

III.

Your petitioners respectfully believe that you erred in that part of the Order of August 10th,

1954, (of which Order a copy is attached hereto marked petitioners' Exhibit "A") in which you directed:

"that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954."

IV.

The effect of the quoted portion of the Order of August 10, 1954, quoted in the preceding paragraph, was to make your petitioners unsecured creditors on a parity with creditors who extended credit to the debtor corporation prior to the date of the filing of the debtor proceedings, but who rendered services subsequent to the filing of the debtor proceeding, which was a cost and expense of administration as provided for by Section 64a(1) of The Bankruptcy Act and as was provided for in the Plan of Arrangement, and said quoted portion of the Order was in error in that it imposed a condition upon the payment to be paid to your petitioners as attorneys for the debtor not intended or contemplated by your petitioners' petition for fees or by the terms of the arrangement or by the law applicable to fees to attorneys for debtors in confirmed plans of arrangement.

V.

That your petitioners because of their desire to be helpful to the debtor by expressing a willingness to accept a note payable as indicated are being penalized by the quoted portion of the Order of August 10th, 1954, and said quoted portion of the

Order of August 10th, 1954, is further in error in that it is contrary to the conditions upon which your petitioners indicated a willingness to accept a note payable in monthly installments as set forth in the petition for allowance to attorneys for debtor.

Wherefore, your petitioners pray that said Order be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy; that the quoted and objectionable portion of the Order of August 10th, 1954, be reversed and/or modified to the end that the allowance ordered to be paid to your petitioners as attorneys for the debtor, being one of the costs and expenses of administration, shall constitute a lien on the assets of the debtor corporation subject to other liens presently of record, until paid.

SAMUEL A. MILLER.
MASON & WALLACE.

By /s/ SAMUEL A. MILLER.

Duly verified.

[Endorsed]: Filed August 20, 1954. Referee.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE ON REVIEW

To the Honorable James M. Carter, Judge of the
United States District Court, Southern District
of California, Central Division:

I, David B. Head, Referee in Bankruptcy of this court, do certify as follows:

On June 9, 1954, an order was entered herein confirming debtor's plan of arrangement. Thereafter and on June 18, 1954, Samuel A. Miller and Mason and Wallace filed a petition for allowance of fees as attorney for debtor. After notice to creditors and hearing on the petition, I entered an order allowing fees in amount of \$3,500.00 and provided:

“* * * the debtor execute and deliver to them the note of the debtor corporation, payable in twelve (12) equal installments, with interest at six (6) per cent for the payment thereof, and that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954.”

Counsel had asked in their petition that “* * * which sum, when allowed, being one of the costs and expenses of administration, shall be a lien on the assets of the debtor corporation until paid.”

I was unable to make an order which would have created a lien against the debtor's property for the reason that I would have diminished the equity of general creditors in the estate after confirmation. Any priority the petitioners could have asserted under sections 64a(1) or 337(2) of the Bankruptcy Act was waived by not presenting their petition before confirmation so that the court could have required a deposit sufficient to cover any allowance, 8 Collier 567.

The order of confirmation provided:

“It Is Further Ordered, that the Debtor shall not further encumber its present assets until all creditors have been paid in full, or in the alternative, without first advising the creditors of its intention to further encumber its present assets.”

The petitioners have asked me to do what I had restrained the debtor from doing.

From that part of the order directing that they be classed as general creditors, the petitioners have filed a Petition for Review.

I further certify the following papers from my file.

- (1) Order of Confirmation.
- (2) Petition for Allowance.
- (3) Order re Allowance.
- (4) Petition for Review.

Dated: August 24, 1954.

Respectfully submitted,

/s/ DAVID B. HEAD,

Referee in Bankruptcy.

[Endorsed]: Filed August 24, 1954.

In the District Court of the United States, Southern
District of California, Central Division

No. 60220-C

In the Matter of

HARRY SMITH MACHINE COMPANY, a California Corporation,

Debtor.

ORDER AFFIRMING REFEREE'S ORDER
DENYING PRIORITY OF PAYMENT OF
ALLOWANCE TO ATTORNEYS FOR
DEBTOR

The petition for Review filed by Messrs. Samuel A. Miller and Mason & Wallace as the attorneys for the above-named debtor, from that part of the Referee's Order that the compensation to said attorneys "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954" came on regularly for hearing on the 4th day of October, 1954, at the hour of 10:00 o'clock a.m. in the Courtroom of the undersigned District Judge, Samuel A. Miller appearing on his own behalf and on behalf of his associate counsel, Messrs. Mason & Wallace, and no other appearances having been made, and the matter having been submitted to the Court upon all of the records, papers and files before it, including the Points and Authorities submitted by said Samuel A. Miller and Mason & Wallace, and the Court having considered the Petition to Review and being fully advised in the premises, now makes the following Order:

It Is Ordered that that part of the Findings of Fact, Conclusions of Law and Order thereon by David B. Head, Referee in Bankruptcy, dated August 10th, 1954, that the compensation of the attorneys for the debtor "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954," be affirmed, and the Findings of Fact and Conclusions of Law of the Referee are adopted by the undersigned Court as the Findings of Fact and Conclusions of Law of the undersigned Court:

By reason of all of the foregoing, that part of the Order of the Referee reviewed that the compensation to the attorneys for the debtor "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954," made on the 10th day of August, 1954, be and the same is hereby approved and affirmed.

Dated this 16th day of November, 1954.

/s/ JAMES M. CARTER,
District Judge.

Read and Approved as provided by Local Rule 7(a) of the District Court.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor.

[Endorsed]: Filed November 17, 1954.

Judgment docketed and entered November 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS, NINTH CIRCUIT

Notice Is Hereby Given that Samuel A. Miller and Messrs. Mason & Wallace, attorneys for the debtor herein, duly appointed such under an Order of the Referee in Bankruptcy, do hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from an Order of the District Court herein, made, entered and docketed on the 17th day of November, 1954, which Order affirmed the Referee's Order denying priority of payment of allowance to attorneys for debtor; the Order of the Referee dated August 10th, 1954, from which a Petition for Review was taken, allowed the attorneys for the debtor as compensation the sum of \$3,500.00 and with reference to the payment of said sum ordered that said payment "rank equally with the debts to unsecured creditors covered by the Order confirming arrangement of June 9th, 1954."

Dated this 17th day of December, 1954.

SAMUEL A. MILLER,
MASON & WALLACE.

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor.

[Endorsed]: Filed December 17, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS BY APPELLANTS
TO BE RELIED UPON ON APPEAL
(RULE 75 (d))

Comes now Samuel A. Miller and Messrs. Mason & Wallace, the appellants herein, and submit to the Honorable Judges of the Circuit Court of Appeals for the Ninth Circuit, the following "Statement of Points" to be considered on behalf of the appellants as the points involved in this appeal.

1. Did the Referee in Bankruptcy, Honorable David B. Head, err after making his Order of August 10th, 1954, allowing appellants the sum of \$3,500.00 as attorneys for the debtor, which amount the appellants indicated could be evidenced by a note of the debtor payable in twelve equal installments provided that such sum when allowed be one of the costs and expenses of administration and be a lien on the assets of the debtor corporation until paid, wherein in said Order it was provided with reference to the foregoing

"That said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954."

2. Does it not follow as a matter of law that such sum of money as may be allowed to attorneys for a debtor, who were appointed such under an appropriate Order of the Referee, is entitled to priority and is payable as one of the costs and expenses

of administration as provided by Section 64a(1) and Section 337 (2) of The Bankruptcy Act?

3. That the Referee erred in sending out the notice of meeting of creditors dated July 19th, 1954, "to hear application for allowance to Samuel A. Miller and Mason and Wallace as attorneys for debtor" when he failed to include in said notice a provision that any amount to be allowed by the Referee shall be a lien upon the assets of the estate of the debtor by reason of the priority of the claim for attorney's fees as provided by Section 64a(1) of The Bankruptcy Act.

Dated: December 28th, 1954.

Respectfully submitted,

SAMUEL A. MILLER,
MASON & WALLACE,

By /s/ SAMUEL A. MILLER,
Attorneys for Debtor and
Appellants Herein.

[Endorsed]: Filed December 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 66, inclusive, contain the origi-

nal Petition Under Chapter XI; Approval and Order of Reference; Petition for Arrangement Under Section 322; Amendment to Petition for Arrangement Under Section 322; Referee's Certificate on Review; Order of Confirmation; Petition for Allowance; Order re Allowance; Petition for Review; Referee's Supplemental Certificate on Review; Petition for Appointment of Attorneys; Order Appointing Attorneys for Debtor; Notice of Meeting of Creditors; Order Affirming Referee's Order Denying Priority of Payment of Allowance to Attorneys for Debtor; Notice of Appeal; Cost Bond; Statement of Points on Appeal and Designation of Record on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this day of January, A.D. 1955.

[Seal]

EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 14631. United States Court of Appeals for the Ninth Circuit. In the Matter of Harry Smith Machine Company, a California Corporation, Debtor. Samuel A. Miller and Mason & Wallace, Appellants. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed January 20, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14631

In the Matter of
HARRY SMITH MACHINE COMPANY, a Cali-
fornia Corporation,
Debtor.

**REQUEST TO INCLUDE IN RECORD ON
APPEAL CERTAIN DOCUMENTS**

To Paul P. O'Brien, Clerk of the United States
Court of Appeals for the Ninth Circuit:

Please be advised that it is the desire and request of the Appellant in the above-entitled matter, that the "Statement of Points by Appellant to be relied upon on appeal" (pages 63 and 64 of District Court Clerk's certified typewritten transcript of record), and the "Appellant's designation of contents of record on appeal" (pages 65 and 66), and which were filed by the Appellant with the Clerk of the District Court of the United States, Southern District of California, Central Division, be included in the record on appeal to be prepared as required by the rules of the above-entitled Court.

Dated: February 9th, 1955.

**SAMUEL A. MILLER,
MASON & WALLACE.**

By /s/ **SAMUEL A. MILLER,**
Attorneys for Debtor and
Appellant Herein.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 10, 1955.



IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HARRY SMITH MACHINE COMPANY, a California corporation,

Debtor.

SAMUEL A. MILLER and MASON & WALLACE,

Appellants.

APPELLANTS' OPENING BRIEF.

SAMUEL A. MILLER,
208 West Eighth Street,
Los Angeles 14, California,

MASON & WALLACE,
110 Pine Avenue,
Long Beach 2, California,

Attorneys for Debtor and Appellants Herein.

FILED

APR 27 1955

PAUL H. O'BRIEN, CLERK



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No. 14631

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of

HARRY SMITH MACHINE COMPANY, a California corporation,

Debtor.

SAMUEL A. MILLER and MASON & WALLACE,

Appellants.

APPELLANTS' OPENING BRIEF.

Appeal and Jurisdiction.

This appeal is taken under Section 24 of The Bankruptcy Act of 1938 as amended, to reverse an Order of the District Court [Tr. of Rec. pp. 32 and 33]. That Order, on Review, affirmed a Referee's Order [Tr. of Rec. pp. 25 and 26] allowing attorney's fees in the sum of Thirty-five Hundred (\$3,500.00) Dollars to the appellants as attorneys for the debtor, but fixing the status and order of payment of said amount as "ranking equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954" [Tr. of Rec. p. 26].

Basis of and Points on Appeal.

There are three grounds upon which this appeal is based. Stated in another way there are three questions to be determined on appeal. They are questions of law only, as the facts are undisputed.

Those questions are:

1. Did the Referee in Bankruptcy, Honorable David B. Head, err after making his Order of August 10, 1954 [Tr. of Rec. pp. 25 and 26] allowing appellants the sum of Thirty-five Hundred (\$3,500.00) Dollars as attorneys for the debtor, which amount the appellants indicated could be evidenced by a note of the debtor payable in twelve equal installments provided that such sums when paid be one of the costs and expenses of administration and be a lien on the assets of the debtor corporation until paid [Tr. of Rec. pp. 19 to 24, incl.] when the Referee provided in said Order [Tr. of Rec. pp. 25 and 26]

“that said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954” [Tr. of Rec. pp. 16 to 18, incl.].

2. Does it not follow as a matter of law that such sum of money as may be allowed to attorneys for a debtor who were appointed such under an appropriate Order of the Referee [Tr. of Rec. p. 5] is entitled to priority and is payable as one of the costs and expenses of administration as provided by Section 64a(1) and Section 337(2) of The Bankruptcy Act?

3. Did the Referee err in sending out notice of meeting of creditors dated July 19, 1954 [Tr. of Rec. p. 25] “to hear application for allowance to Samuel A. Miller

and Mason & Wallace as attorneys for the debtor” when he failed to include in said notice (if indeed it was legally necessary for him to do so) a provision that any amount to be allowed be a lien upon the assets of the estate of the debtor by reason of the priority of the claim for attorney’s fees as provided by Section 64a(1) of The Bankruptcy Act and by Section 337(2) of The Bankruptcy Act?

The foregoing grounds of appeal or questions on appeal will be amplified by the appellants’ statements of points and authorities to be relied upon in this appeal and as are hereinafter set forth.

Statement of Facts.

On March 10, 1954, debtor filed an original petition under Section 322, without schedules, and on March 26, 1954, the above named debtor filed the original plan for arrangement under Section 322 of The Bankruptcy Act [Tr. of Rec. pp. 6 to 13, incl.]. On April 13, 1954, the debtor filed an amendment to Petition for Arrangement under Section 322 [Tr. of Rec. pp. 14 and 15].

On March 23, 1954, the appellants herein as attorneys for the debtor filed a petition on behalf of the debtor for their appointment as attorneys for the debtor [Tr. of Rec. pp. 3 to 5, incl.], and on March 23, 1954, the Referee signed an Order [Tr. of Rec. p. 5] appointing the appellants herein as the attorneys for the debtor in possession, said appointment being “under a general retainer” and providing that “they shall be compensated for their services out of the estate of the debtor.”

Thereafter the usual and customary proceedings were had as in other petitions for arrangements under Section 322, resulting in an Order Confirming Arrangement [Tr. of Rec. pp. 16 to 18, incl.], dated June 9, 1954.

After the signing of the Order Confirming Arrangement [Tr. of Rec. pp. 16 to 18, incl.] and *after* it was ascertained that the creditors were willing to accept the plan and the amendment to the plan offered by the debtor, and *after* the Order Confirming Arrangement [Tr. of Rec. pp. 16 to 18, incl.] was signed, the appellants herein, on June 28, 1954, filed their "Petition for Allowance to Attorneys for Debtor" [Tr. of Rec. pp. 19 to 24, incl.]. Thereafter and on July 19, 1954, the Referee sent a notice pursuant to Section 58, Subdivision 8 of The Bankruptcy Act of a meeting of creditors [Tr. of Rec. p. 25] to hear the application for allowance, which meeting was held on July 29, 1954, at which time no creditor or other person in interest appeared to object to the amount of the allowance or to make any other objection in connection with the appellants' petition for allowance, and at which meeting the debtor did not appear to object nor has the debtor objected at any time to the amount requested in allowance as attorneys for the debtor (or that such amount be a lien on its assets), and also at which time the Referee took the matter of the application for allowance under submission, and on August 10, 1954, the Referee made an Order of Allowance to the attorneys for the debtor (the appellants herein) [Tr. of Rec. pp. 25 and 26], being the Order which in part led to the Petition for Review and to this appeal, the objectionable part of the Order being that part which fixed the status of the fees to the attorneys for the debtor (the appellants herein) indicating that the attorney's fees would "rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954."

Appellants believe that the foregoing represents and constitutes a fair statement of the facts of this case lead-

ing up to the Review to the District Court of the Referee's Order and leading up to and being the basis of the appeal herein.

Statement of Law on Points Involved and Arguments Thereon.

Point 1. Did the Referee in Bankruptcy err after making his Order of August 10, 1954, allowing appellants the sum of Thirty-five Hundred (\$3,500.00) Dollars as attorneys for the debtor, which amount the appellants indicated could be evidenced by a note of the debtor payable in twelve equal installments provided that such sum when allowed be one of the costs and expenses of administration and be a lien on the assets of the debtor corporation until paid, wherein in said Order it was provided with reference to the allowance:

“That said note rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954.”

In submitting the law on the points raised on this appeal as hereinabove set forth, reference is first made to that part of the Petition for Arrangement under Section 322 starting with Subdivision IIIA thereof [Tr. of Rec. pp. 6 and 7] reading as follows:

“A. The debts of your petitioner to be affected by this plan of arrangement shall be as follows:

1. All debts which have priority under Section 64a (1), (2) and (4) of The Bankruptcy Act.

“B. The debts of your petitioner as above set forth shall in this plan of arrangement be treated as follows:

1. All debts included in Class A(1) are to be paid in cash in full upon the signing of the Order of

Confirmation of the plan, or to be paid at such time and in such installments as may be agreed upon by and between your petitioner and the various Taxing Agencies having claims coming within this class of indebtedness.”

Section 64a(1) reads as follows:

“Section 64. DEBTS WHICH HAVE PRIORITY.

“a. The debts to have priority, in advance of the payment of dividends to creditors, and *to be paid in full* out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; etc., etc., and one reasonable attorney’s fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the Court may allow.” (The italics above does not appear in the text but is used for emphasis.)

The foregoing has to do with attorney’s fees in straight bankruptcy matters and is included in Chapters I to VII of The Bankruptcy Act.

Section 302 under the title of Arrangements, Chapter XI provides as follows:

“Section 302. The provisions of Chapter I to VII inclusive, of this Act, shall, insofar as they are not inconsistent or in conflict with the provisions of this Chapter, apply in proceedings under this Chapter. For the purposes of such application, provisions relating to ‘bankrupts’ shall be deemed to relate also to ‘debtors’ and ‘bankruptcy proceedings’ or ‘proceedings in bankruptcy’ shall be deemed to include proceedings under this Chapter, etc., etc.”

Section 337, subdivision 2, reads as follows:

“Section 337. At such meeting, or at any adjournment thereof, the Judge or Referee shall, after the acceptance of the arrangement—

“(2) Fix a time within which the debtor shall deposit, in such place as shall be designated by and subject to the Order of the Court, the consideration, if any, to be distributed to the creditors, *the money necessary to pay all debts which have priority, unless such priority creditors shall have waived their claims or such deposit*, or consented in writing to any provision of the arrangement for otherwise dealing with such claims, and the money necessary to pay the costs and expenses of the proceedings, and the necessary expenses, in such amount as the Court may allow, etc., etc.” (The italics does not appear in the text but is used for emphasis.)

It follows from the citations of Section 64a(1) (United States Code, Title 11, Chap. 7, Sec. 104) and Section 302 of The Bankruptcy Act (United States Code, Title 11, Secs. 701-709) that whatever applies to attorneys for “bankrupts” likewise applies to attorneys for “debtors,” and that therefore if an attorney for a bankrupt were entitled to be paid in full such reasonable amount as the Court would allow for services rendered to the bankrupt, the attorneys for a debtor would likewise be entitled to be compensated in full out of the assets of the estate to the extent of such an amount as the Court would find to be reasonable.

In this proceeding the Referee had found the amount to be paid as reasonable was in the sum of Thirty-five Hundred (\$3,500.00) Dollars and, of course, the only quarrel that the appellants have is with the quoted portion of the Order appealed from, namely, that the payment

“rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954” [Tr. of Rec. pp. 16 to 18, incl.].

In 8 Collier on Bankruptcy at pages 540 and 541, and under Section 337(2), which is quoted hereinabove, it is clear that a deposit is unnecessary if the deposit is waived, and in this instance the appellants herein waived the deposit by their expressed willingness to accept the debtor's note in twelve equal monthly installments provided only that the amount allowed should be “a lien” upon the assets of the debtor, as set forth in their Petition for Allowance [Tr. of Rec. p. 23]. It may be well at this point to point out to this Honorable Court that the appellants herein, as stated in their Petition for Allowance [Tr. of Rec. p. 23]

“were mindful of the fact that the debtor might not have the present ability to pay such amount as would be allowed by the Court to them as attorneys for the debtor and were willing to accept the note of the debtor corporation to be paid in twelve equal monthly installments with interest at six percent and which sum, when allowed, being one of the costs and expenses of administration, shall be a lien upon the assets of the debtor corporation until paid.”

The Referee in his Certificate on Review [Tr. of Rec. pp. 29 to 31, incl.] stated as follows:

“Any priority the petitioners could have asserted under Section 64a(1) or 337(2) of The Bankruptcy Act, was waived by not presenting their petition before confirmation so that the Court could have required a deposit sufficient to cover any allowance.” (Citing 8 Collier, 567.)

The Honorable Referee seems to have lost sight of the fact that appellants waived their right to a deposit as pro-

vided under Section 337(2) by their expressed willingness to accept the note payable in twelve equal monthly installments, provided only that the amount allowed should be “a lien” upon the assets of the debtor.

The Referee further stated in his Certificate on Review that the Order of Confirmation [Tr. of Rec. pp. 16 to 18, incl.] in part read as follows:

“IT IS FURTHER ORDERED, that *the debtor shall not further encumber its present assets until all other creditors have been paid in full, or in the alternative, without first advising the creditors of its intention to further encumber its present assets.*” (The italics does not appear in the quoted portion of the Order but is used for emphasis.)

The Referee further states in his Certificate on Review “The petitioners (being the appellants herein at this time) have asked me to do what I had restrained the debtor from doing.”

The Honorable Referee seems to have lost sight of the fact that what your appellants had asked the Referee to do in order to be helpful to the debtor, to wit, to make the promissory note which your appellants agreed to take, “a lien” upon the debtor’s assets, he could do and had a legal right to do, although the debtor did not have the right to do so without “first advising the creditors of its intention to further encumber its present assets,” as was provided in the Order of Confirmation.

The notice to the creditors that the “present assets” of the debtor were to be “further encumbered” by “the lien” was a notice that the debtor had to give, but certainly not the Court, if the debtor wanted to further encumber its assets.

A notice to creditors of the Petition for Allowance went out to all creditors. This notice was sent out under the supervision and direction of the Referee and was under the control of the Referee and was not under the supervision, direction or control of the appellants herein or the debtor herein and the Referee could have and should have stated in that notice the request of your appellants for the “lien upon the assets” of the debtor if the Court felt that such notice was required and that the amount to be allowed to your appellants should be paid in full as a priority claim, which is in accordance with the law as set forth in Section 64a(1) of The Bankruptcy Act, Section 302 of The Bankruptcy Act and Section 337(2) of The Bankruptcy Act.

It would seem from the foregoing that the second point involved in this appeal is also disposed of in that attorneys who were appointed such for a debtor under an appropriate Order of the Referee are entitled to priority and to be paid in full as a cost and expense of administration such amount as may be allowed to them as reasonable attorney’s fees.

And it further follows that Point 3 is disposed of in that it clearly appears that if under the Order of Confirmation the assets of the debtor corporation were not to be further encumbered “until all other creditors have been paid in full, *or in the alternative without first advising the creditors of its intention to further encumber its present assets.*” (The italics does not appear in the quoted portion of the Order but is used for emphasis.) That the

Referee erred when he sent out the notices of the meeting of creditors dated July 19, 1954 [Tr. of Rec. p. 25] when he failed to insert and include in said notice (the sending of which was solely and exclusively under his control) a provision "that any amount to be allowed by the Referee shall be a lien upon and a further encumbrance upon the assets of the debtor by reason of the priority of the claim for attorney's fees as a cost and expense of administration as provided by 'The Bankruptcy Act.'"

Your appellants have been unable to find any cases on the points involved in this appeal and have had to rely solely upon logic and a reasonable interpretation of the Sections of The Bankruptcy Act referred to and the references in Collier on Bankruptcy, and it appears to the appellants that it is not consistent with The Bankruptcy Act to expect attorneys who have come into existence as attorneys for a debtor under an appropriate Order of the Court after the filing of the debtor proceedings, to render services to the debtor in the bankruptcy proceedings and then have those services compensated for on the basis of a general unsecured creditor whose claim was in existence at the date of bankruptcy or at the date of the Order of Confirmation.

If the Order of the Referee that the amount to be allowed to your appellants, which the Court has apparently found to be a reasonable amount, shall rank equally with the debts to unsecured creditors covered by the Order Confirming Arrangement of June 9, 1954 [Tr. of Rec. pp. 16 to 18, incl.], then it appears that your appellants

are being penalized by the Order of the Referee, in that your appellants are being required to render services and to continue to render services for a period of eight months after the 9th day of June, 1954, as the Order Confirming Arrangement [Tr. of Rec. p. 17] provides "That the Court shall retain jurisdiction for a period of eight month from the date hereof for all purposes," for compensation equivalent to the amount to be paid to unsecured creditors in the event of liquidation, which is certainly a situation not contemplated by The Bankruptcy Act, and expecially Section 64a(1), 302 and 337(2).

It is respectfully urged that by reason of the foregoing that the Order of the Honorable James M. Carter dated November 16, 1954 [Tr. of Rec. pp. 32 and 33], affirming the Referee's Order denying priority of payment of allowance to attorneys for the debtor be reversed and the Honorable District Judge be directed to order the Referee to send out a new notice to creditors (if indeed a new or different notice is required), in which notice to creditors it shall clearly set forth that it is the intention of the Referee to encumber the assets of the debtor to the extent of the amount of attorney's fees allowed by the Court to be reasonable and in the sum of Thirty-five Hundred (\$3,500.00) Dollars.

It is further urged that it would be inequitable to expect your appellants as the attorneys for the debtor, who have already rendered substantial services for which the Court has made an allowance of Thirty-five Hundred (\$3,500.00) Dollars as being the reasonable value of the serv-

ices, to be paid that sum of Thirty-five Hundred (\$3,500.00) Dollars on a pro rata basis in the event that the debtor's plan of arrangement should ultimately fail and an order of liquidation be made by the Referee as provided by Section 377 of The Bankruptcy Act, and to find themselves in the same class of general unsecured creditors whose claims were incurred prior to the filing of the debtor proceedings herein and to be paid, if at all, such dividends as would be realized from a liquidation of the assets of the debtor on hand at the date of liquidation.

Respectfully submitted,

SAMUEL A. MILLER, and

MASON & WALLACE,

By SAMUEL A. MILLER,

Attorneys for Debtor and Appellants Herein.



IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

JAMES JOSEPH CRAIN,

Appellant,

vs.

JOHN P. BOYD, District Director,
Immigration and Naturalization Service,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

CHARLES P. MORIARTY
United States Attorney
Western District of Washington

F. N. CUSHMAN
Assistant United States Attorney

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Seattle 4, Washington

FILE
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NORTHERN DIVISION

HONORABLE WILLIAM J. LINDBERG, *Judge*

BRIEF OF APPELLEE

JURISDICTION

The order of the District Court denying application for writ of habeas corpus was entered September 20, 1954. Jurisdiction of the District Court was had under Title 28, U.S.C. 2241 and of this court under Title 28, U.S.C. 1291 and 2253.

QUESTIONS PRESENTED

1. Whether Congress can provide for the deportation of a resident alien on grounds not made a condition at the time of entry?

2. Are deportation proceedings invalid:

- a. By mere lapse of time when alien has made no showing of prejudice?
- b. Because of the addition of an amended charge after the relevant evidence in support thereof has been introduced, all without a showing of prejudice?
- c. Because a portion of the proceedings, were admittedly not conducted in accordance with the Administrative Procedures Act, even though the evidence introduced at earlier valid hearings was sufficient as a matter of law?

3. Was appellant prejudiced because the District Court erroneously refused to consider his request for declaratory relief?

STATEMENT OF THE CASE

Appellant entered the United States at New York in 1915 from Ireland and has remained in this country as an alien.

In 1938 he was arrested on a warrant in deportation proceedings, charging him with being a deportable alien in that he was a member of or affiliated

with an organization advocating the violent overthrow of the United States government. Deportation hearings were held in 1938 with no final action. In February 1948 the Commissioner of the Immigration and Naturalization Service ordered the reopening of hearings to bring the matter up to date.

Hearings were held during 1948 and 1949, and again in 1951. The 1951 hearing, on February 13, was held to consider an amended or additional charge lodged at that time, that appellant was deportable under the Internal Security Act of 1950 in that he had been a member of the Communist Party.

During the 1938 hearings, appellant had admitted that he was a member of the Party. Based upon this admission the Hearing Officer on June 19, 1951, found appellant to be deportable under the amended charge.

After consideration of appellant's exceptions the Assistant Commissioner ordered appellant's deportation, from which order appellant appealed to the Board of Immigration Appeals, said appeal being dismissed January 8, 1953.

Appellant petitioned the District Court for the Western District of Washington on February 4, 1953 for review of the deportation proceedings alleging the unconstitutionality of the Internal Security Act of

1950 and also violations of procedural due process in the manner in which the hearings were conducted.

District Judge William J. Lindberg, on April 8, 1953, entered findings and conclusions adverse to appellant's contentions. The order dismissing appellant's petition was deferred by stipulation so that appellant could apply for "discretionary relief." Upon denial of "discretionary relief," the order dismissing appellant's petition was entered September 20, 1954. It is from this order that appellant prosecutes this appeal.

The details on which appellant's alleged procedure defects are based, cover considerable ground and are discussed in detail as they are reached in the argument (*infra*).

SUMMARY OF ARGUMENT

That Congress may provide grounds for deportation of a resident alien which grounds were not conditions at the time of his entry into the United States is a conclusively settled proposition of law.

The delay in the conduct of the deportation proceedings was not considered below, and hence is not explained in the record. In any event mere delay unexplained with no showing of prejudice to appellant is not sufficient to invalidate a deportation pro-

ceeding.

Appellant's last contention, that he was not accorded due process of law because of the introduction of an amended charge without the subsequent taking of testimony is of no moment where the amendment cannot be shown to have prejudiced him and where sufficient testimony was theretofore in the record, having been taken in an earlier session of the deportation proceedings.

ARGUMENT

I. CONGRESS MAY IMPOSE NEW CONDITIONS FOR DEPORTATION SUBSEQUENT TO LAWFUL ENTRY.

In *Galvan v. Press*, 347 U.S. 522, the power of Congress to provide for the deportation of a legally resident alien because of his membership in the Communist Party, a ground enacted subsequent to entry, was upheld. See also *Jay v. Boyd*, 9th Circuit decided May 10, 1955, F. 2d

II. THE EFFECT OF DELAY IN THE INSTANT PROCEEDINGS WAS NOT PREJUDICIAL TO APPELLANT.

Appellant, without having pleaded facts in his petition supporting the claim, alleges now in his Brief to this Court that the delay in the administrative pro-

ceedings herein has not only severely prejudiced appellant but has resulted in illegality stemming from a defect in the warrant of arrest; it not being executed within a reasonable time. Plaintiff cites a number of cases in his brief on p. 34 to the effect that a long unexplained delay will invalidate a warrant of arrest and also other cases pertaining to delay in execution of a warrant of deportation.

In answer to this contention, it is important first to consider that the matter was not raised in the Court below, hence appellee was given no chance to explain or justify the apparent delay. The record in this Court also shows that no showing of prejudice to appellant was made in the District Court. It is apparent, however, from the course of the proceedings that the major part of the delay took place during the years of the second World War at a time when deportation was impossible, a fact of which this Court can take judicial notice. Also apparent from the course of the proceedings is the change in statutory basis for the deportation of one who is allegedly a member of the Communist Party. We also suggest to the Court that another factor in the delay was an attempt to comply with a 1950 decision requiring compliance with the Administrative Procedures Act. *Wong Yang Sung v. McGrath*, 339 U.S. 33. We are not here attempting to explain or justify the delay but are merely show-

ing that, had the matter been considered below that a showing could have been made.

Without considering the cases cited by appellant in detail it will suffice to note that in both *Petition of Popper*, 79 F. Supp. 530, and *U. S. v. Parson*, 22 F. Supp. 149, the question was the legality of residence in the United States by an alien, subject to an old order of deportation, for purposes in one case of naturalization; the other of denaturalization. The Court in *Popper* (supra) stated that the fact that an alien was subject to an order of deportation did not make her continued residence illegal. However the Court added language on which appellant here relies to the effect that a long lapse of time had occurred without the effecting of deportation, and that the government had at no time in the naturalization indicated a present desire to deport the alien and hence the Court was concluding that the government was no longer interested in the deportation order. The present proceeding is not a last minute urging of deportability to prevent naturalization but is a deportation proceeding itself.

The whole picture of delay in deportation matters has recently been considered by this circuit in *Spector v. Landon*, 209 F. 2d 481 (1953). On page 482 of that opinion the Court stated:

"No cases have been found by counsel holding that a deportation warrant becomes unenforceable through mere lapse of time, or for that matter because of dilatory conduct or laches on the part of the immigration authorities in effecting deportation."

and again on that page:

"It is not thought that dilatoriness or laches on the part of the authorities in the execution of the warrant would be regarded as of consequence unless the person affected is shown to have been prejudiced thereby. Obviously, the delay in effecting appellant's deportation operated to his advantage rather than the reverse * * * He has been permitted to remain in the United States, has been free to go where he would and to enjoy such material advantages as the country affords to its own citizens."

The fact remains, that, whether or not it was legally necessary to do so, in this case the delay could probably have been explained had appellant urged the matter below.

III. APPELLANT WAS NOT DENIED A HEARING ON THE CHARGES ON WHICH DEPORTATION WAS BASED.

It cannot be denied as appellant states on p. 36 of his Brief that an alien must be provided with procedural due process in deportation matters. The denial of due process urged by appellant in this case is basically explained as a contention that an addi-

tional or amended charge cannot be lodged in a deportation proceeding even though supported by the testimony previously taken. It is not denied by appellee that there was no repetition of the previous evidence supporting this charge after the amended charge was lodged. It is admitted, however, that prior admissions by appellant in the earlier proceedings fully support the amended charge, assuming the validity of that testimony both in regard to the conduct of the hearing at which it was given and its use in support of the amended charge.

It must first be pointed out that a deportation hearing is a civil action in nature. *Ex parte Shigenari Mayemura*, 53 F. 2d 621. And as such a latitude in amending charges to conform with the evidence should be allowed commensurate with that in the normal civil action.

In *Galvan v. Press*, 201 F. 2d 302, 347 U.S. 522, the opinion of this circuit below, shows that in a situation almost identical to the present case, that it is proper to amend or clarify the charges during the continuance of the administrative proceedings. It appears that the amendment in the instant case was done for the exact same purpose, i.e., to conform with the simplification of the Internal Security Act of 1950,

8 U.S.C., Sec. 137, which removed the requirement of proof of the nature of the Communist Party.

What then is the effect of a lack of evidence subsequent to the lodging of the amended charge? In the *Galvan* case supra, the appellant stipulated that the evidence taken previously could be received as evidence in the final hearing, and hence the Court did not seriously consider the question.

The final hearing in the instant case was stated to be a continuation of prior hearings, as such this proceeding should be considered exactly as any other civil case. Amendment of the pleadings to conform to the evidence is permitted under Rule 15(b) of the Federal Rules of Civil Procedure, in the discretion of the trial court. A judge's determination on the question of amendment will normally depend on the prejudice to the opposing party. In the instant case appellant was given opportunity, p. 403 of Exhibit A, to ask for additional time to prepare his defense to the amended charge and did not choose to do so. Again the matter of the validity of the amendment itself or any prejudice to appellant was not considered below since these matters were not raised by the petition.

There still remains for disposal the contention of appellant that because a portion of the hearings prior to the time of the case of *Wong Yang Sung*, 339 U.S.

33, were not conducted in accordance with the Administrative Procedures Act that there can be no evidence to support the amended charge.

It must be pointed out that the Administrative Procedures Act was enacted in 1946 therefore there can be no question of illegality in regard to the 1938 proceedings. It was on April 11, 1938, Exhibit A, p. 3, that appellant was asked: "Are you a member of the Communist Party?" to which he answered, "Yes," "How long have you been a member?" The answer — "about 6 months approximately." Further admissions at this hearing clearly supported the above admission. Appellant, of course, objects to the lack of compliance with the Administrative Procedures Act at the time of the 1948 hearings. However due to statutory changes subsequent to the 1948 hearings all the evidence therein introduced became immaterial and as a matter of law the evidence introduced at the 1938 hearing was sufficient to require appellant's deportation. *Galvan v. Press* (supra).

Appellant has no standing to argue a denial of a fair hearing because of noncompliance with the Administrative Procedures Act, because of the provision in Title 5, U.S.C., Section 1011 providing" . . . no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date

of such requirement.” This provision was held to apply to deportation proceedings instituted prior to enactment in *Harisiades v. Shaughnessy*, 342 U.S. 580.

IV. REVIEW OF APPELLANT’S CASE BELOW BY WAY OF WRIT OF HABEAS CORPUS ONLY WAS NOT PREJUDICIAL ERROR.

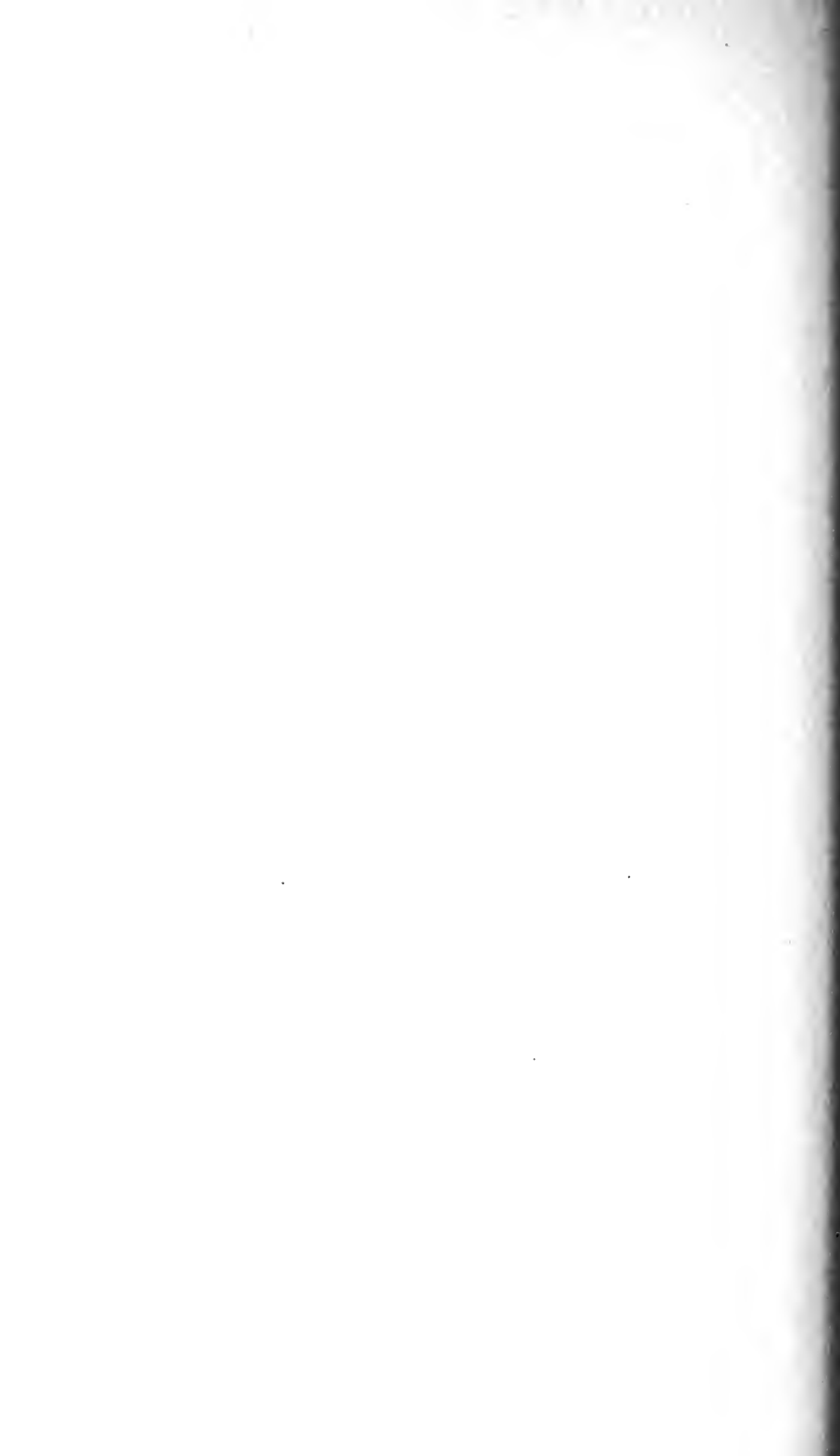
It is conceded, as appellant asserts, that the district court denied his request for consideration of the deportation proceedings by way of an action for declaratory relief. It is further conceded that under the very recent Supreme Court case of *Shaughnessy v. Pedreiro* U.S., this position is technically in error. However, appellant has not shown how that error could have been prejudicial to him in the instant case where the substantive ground for deportation, i.e., membership in the Communist Party, was admitted and clearly complies with the Administrative Procedures Act requirement of substantial evidence. *Sumio Madokaro v. Del Guercio*, 9th Circuit, 160 F. 2d 164, cert. denied, 322 U.S. 764; *Marcello v. Aherns*, 219 F. 2d 830, aff’d U.S.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

CHARLES P. MORIARTY
United States Attorney

F. N. CUSHMAN
Assistant United States Attorney



No. 14634

In the
United States Court of Appeals
For the Ninth Circuit

ARTHUR PARISSETTE CLARK,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	
<i>Appellee.</i>	

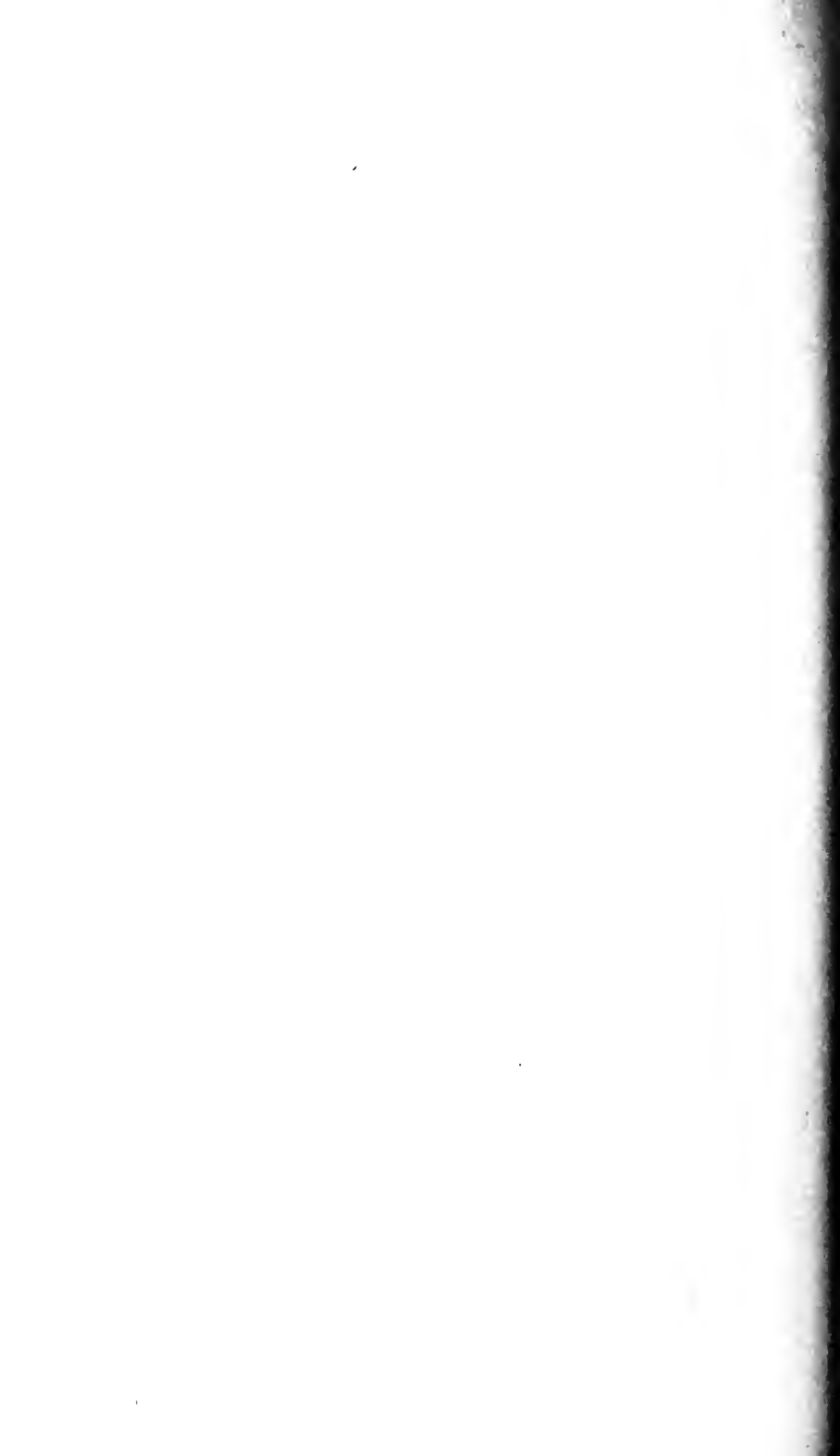
Petition for Rehearing

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FILED

JUL 18 1956

PAUL P. O'BRIEN, CLERK



In the
United States Court of Appeals
For the Ninth Circuit

ARTHUR PARISSETTE CLARK,	}	No. 14634
<i>Appellant,</i>		
vs.		
UNITED STATES OF AMERICA,		
<i>Appellee.</i>		

Petition for Rehearing

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on June 20, 1956, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion is incorrect.

FAILURE OF PROOF OF GUILT

It is appellant's position that the uncontradicted evidence shows that he was not put through the army induction ceremony mandatorily required by the law, that the record shows this, and that this showing rebuts any applicable presumption of "regularity."

The slip opinion (pp. 10-11) proceeds on the assumption that the only criterion for deciding this point is whether the selectee had an opportunity to take the "step forward" and concluded that appellant had not met the burden of overcoming the presumption of regularity of official action.

The opinion has ignored

- (a) the mandate of the applicable regulation (S.R. 615-180-1) which requires that a recalcitrant selectee be given *two* opportunities to step forward, the second being preceded by a warning of the penalty, and
- (b) the fact that the *only* evidence on the subject (Ex. 178U and 179U) shows that there was *no attempt* to give the selectee a second chance and no attempt to warn him of the penalty.

It is submitted that this undisputed evidence presents fatal failure to follow the law and completely rebuts the presumption of regularity. Also, see affidavit of counsel attached.

Comparison of the "correct" induction recording set forth in this affidavit with the evidence in appel-

lant's record (Ex. 178U and 179U) shows the fatal variance.

Wherefore, upon the foregoing ground, and for other reasons, appearing in appellant's brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

J. B. TIETZ

Attorney for Appellant.

AFFIDAVIT OF COUNSEL

UNITED STATES OF AMERICA)
 STATE OF CALIFORNIA) ss.
 COUNTY OF LOS ANGELES)

J. B. TIETZ, being first duly sworn, deposes that the following is a true and correct and complete recording of the refusal of a selectee to submit to induction, as shown by the file of Dick Lee Evans, Selective Service No. 4-115-33-228:

“12/6/55 4-115-33-228

“I Dick Evans, was given two chances to be inducted in the Armed Service’s and I refused because of my religious belief. I am apposed (sic) to any military training.

“/s/ Dick Evans

“Witnessed:

/s/ Hoyt J. Harlick
 YNC U.S. Navy

/s/ Samuel G. Wotherspoon
 1st Lt., Inf.

“A TRUE COPY

Local Board No. 115
 Los Angeles County
 December 6, 1955
 11214 S. Brookshire Ave.
 Downey, California”

J. B. TIETZ

Sworn to before me and subscribed in my presence this 16th day of July, 1956

EDWARD RAIDEN

Notary Public in and for said County and State.





